THE

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(The Supreme Court.)

II] JULY [1955

SUPREME COURT OF INDIA.
[Civil Appellate Jurisdiction.]

PRESENT :—VIVIAN BOSE, B. JAGANNADHADAS AND B. P. SINHA, JJ.

Sahu Madho Das and others .. *Appellants**

v.

Pandit Mukand Ram and another .. *Respondents.*

Hindu Law—Alienations by limited owner—Reversioner consenting to and receiving benefit—If can avoid after succession opens.

A family arrangement can, as a matter of law, be implied from a long course of dealings between the parties. Any title conveyed by a limited owner by gift or otherwise would not be void; it would only be voidable. It would be good as against all the world except the reversioner who succeeded when the reversion opened out and he is the only person who would have the right to avoid it; and it would continue to be good until he chose to avoid it. Therefore if he does not avoid it, or is precluded from doing so, either because of the law of limitation or by his own conduct, or for any other reason, then no one else can challenge it; and the law is that once a reversioner has given his assent to an alienation, whether at the time or as a part of the transaction, or later as a distinct and separate act, he is bound though others may not be, and having given his assent he cannot go back on it to the detriment of other persons, all the more so when he himself receives a benefit. Any attempt to go behind that assent cannot render the assent once given nugatory even though it was given when he was not *in titulo* and even though the assent was to a series of gifts.

On Appeal from the Judgment and Decrees dated the 20th March, 1942 of the Allahabad High Court in First Appeals Nos. 154 and 152 of 1934 arising out of the Judgment and Decrees dated the 25th August, 1932, of the Court of First Additional Subordinate Judge, Moradabad, in Original Suits Nos. 90 and 87 of 1931.

N. C. Chatterji, Senior Advocate (*S. S. Shukla*, Advocate, with him) for Appellants.

Gopi Nath Kunzru, Senior Advocate (*B. P. Maheshwari* Advocate, with him) for Respondent No. 1.

P. C. Agarwala, Advocate for Respondent No. 2 in Civil Appeal No. 94 of 1950.

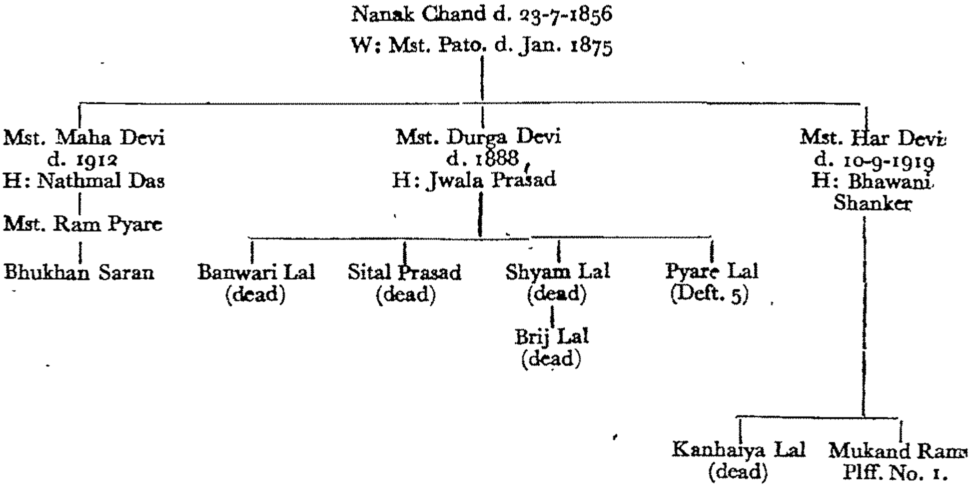
The Judgment of the Court was delivered by

Bose, J.—These appeals arise out of two suits which were heard together along with two other suits with which we are not now concerned. All four raised the same set of questions except for a few subsidiary matters. They were tried together and by common consent the documents and evidence in the various

*Civil Appeals Nos. 92 and 94 of 1950. 22nd March, 1955.

cases were treated as common to all. They were all governed by one common judgment, both in the first Court and on appeal. The defendants appeal here.

The plaintiff, Mukand Ram, is common to all four cases. He sues in each suit as the reversioner to one Pandit Nanak Chand who was his maternal grandfather. The family tree is as below :



The plaintiff's case is that the properties in the four suits belonged to Nanak Chand who died on 23rd July, 1856 leaving a widow Mst. Pato and three daughters, Maha Devi, Durga Devi and Har Devi. On his death, his widow Mst. Pato succeeded. She died in January, 1875 and the estate then went to the three daughters. Of them, Durga Devi died in 1888, Maha Devi in 1912 and Har Devi in 1919. The plaintiff's rights as reversioner accrued on Har Devi's death on 10th September, 1919. But before this came certain alienations which the plaintiff challenges in the present suits. The suits were filed on 8th September, 1931.

In Civil Appeal No. 92 of 1950, the challenge is to a mortgage effected by Durga Devi on 3rd March, 1887 in favour of Sahu Bitthal Das. The mortgagee sued on his mortgage, obtained a decree and in execution purchased the properties himself. The plaintiff's case is that Durga Devi only had a life estate and, as there was no necessity, the mortgage and the subsequent auction purchase do not bind him.

In Civil Appeal No. 94 of 1950, there are two alienations, both sales. The first, dated 23rd September, 1918, was by Pyare Lal (son of Durga Devi) in favour of Shyam Lal, son of Mulchand. (This is not the Shyam Lal who was Pyare Lal's brother). The vendee later sold the properties to the first and second defendants on 5th March, 1927. One of the vendees, the first defendant, is till another Shyam Lal : Shyam Lal son of Harbilas.

The other sale was by Brij Lal's guardian on behalf of Brij Lal, Brij Lal then being a minor. It was on 25th November, 1919 in favour of Chheda Lal. The first and second defendants pre-empted this sale after a fight in Court and took possession under the decree which they obtained.

The plaintiff's case is that Har Devi was alive at the date of the first sale and as the reversion had not opened out Pyare Lal had no power to sell. In the case of the second sale, the reversion had opened out but Brijlal being more remote than the plaintiff got no title, so that sale is also bad.

The defendants' case is that the properties in these two suits (as also in the other two suits with which we are no longer concerned) did not belong to Nanak Chand and formed no part of his estate ; they belonged exclusively to Mst. Pato as part of her personal estate.

On 22nd January, 1864 Mst. Pato executed a document which she called a deed of agreement but which, if it is anything at all, is a will. There are no other parties.

to it and she purports thereby to dispose of her properties after her death. The defendants in Civil Appeal No. 92 of 1950 have called it a will. After saying that she will remain in possession and occupation as long as she lives, Pato says that after her death, her three daughters will be the owners and will either remain in joint possession or will divide the estate in equal shares and, in that event, will take possession of their respective shares and will be the "owners" of them.

But before she died, Pato made another disposition of her estate during her life time in the year 1875 which, of course, abrogated the will. This was done orally. The defendants say that this was a family arrangement in which each of the three daughters was given certain properties absolutely so that each became the absolute owner of whatever fell to her share. Pato also gave properties to each of her four grandsons who were then living, namely Kanhaiya Lal, Mukund Ram, Banwari Lal and Sital Prasad. The defendants asserted that they also took separate and absolute estates immediately and said that each has been holding and dealing with the properties so divided, separately and as absolute owners, ever since. Thus, at the dates of the transfers now challenged, each alienor had an absolute title to the properties alienated and the plaintiff has none.

The trial Court held that though most of the properties in Pato's hands came from her husband Nanak Chand, the plaintiff had not shown that the properties with which his four suits were concerned formed part of Nanak Chand's estate.

An issue was also framed about the family settlement and one about estoppel. On both those points the learned Judge found against the plaintiff. The result was that all four suits were dismissed.

The High Court reversed these findings on appeal and held that all the properties, including the ones in suit, formed part of Nanak Chand's estate. The learned Judges also held that though there was a family arrangement, it was a purely voluntary settlement made by Pato and was not made as the result of any dispute and that in any case it did not bind the plaintiff who was not a party to it and who does not claim through any of those who were. They also held that there was no estoppel. Accordingly, the plaintiff's claim was decreed in each of the four suits.

Appeals were filed here in all four suits by the various defendants but Civil Appeals Nos. 91 and 93 of 1950 were dismissed for want of prosecution, therefore the decree of the High Court in the two cases out of which those appeals arose will stand. We are now only concerned with Civil Appeals Nos. 92 and 94 of 1950.

In the lower Courts much of the effort was concentrated on finding out which items out of a large mass of property belonged to Nanak Chand and which did not. We do not intend to look into that because it is unnecessary on the view we take. We will therefore assume, without deciding, that all the properties in dispute were part of Nanak Chand's estate.

We will deal first with the family arrangement. The learned counsel for the plaintiff argued that the defendants never set up a family arrangement though they have used the words "family settlement". He contended that what they really pleaded was a gift out and out by Pato. It was pointed out that the defendants never suggested a dispute, neither did they suggest that any one ever questioned or doubted Pato's absolute title to the property. Therefore, it was argued, the present case, which is based on the assumption that the property was not Pato's and that she was laying wrongful claim to it, cannot be allowed because it flies in the face of the defendants' pleadings.

There is not much in this objection. The defendants did plead a family arrangement and the matter was put in issue and fought out. The defendants' case was that all the property was Pato's. The plaintiff's case was that it was all Nanak Chand's. The issues were—

"4. Whether Mst. Pato gave properties separately to each of her three daughters and to daughters' sons and put them in proprietary possession and they remained absolute owners of their properties and what is its effect on the case ?

5. Whether the arrangement mentioned in issue No. 4 was by way of family settlement and what is its effect on the case ?"

These issues are broad enough to cover the present point. If the properties really belonged to Nanak Chand, as the plaintiff claims, then the case for a family settlement becomes all the stronger, for it is clear that Pato laid claim to them as her own properties of which she could dispose by will, for that is what the document of 1864 really is. If, on the other hand, they were her properties, as the defendants say, then she had the right either to gift them outright or to settle them as the defendants say she did by way of a family arrangement. In either case, the matter was fully fought out and neither side was misled.

The real question we have to decide is, has the family arrangement been proved ? We think it has.

The direct evidence on this point is that of Shyam Lal (D.W. 1 in C.A. No. 94/50) and the first defendant there. He tells us that he had money lending transactions with Har Devi, Kanhaiya Lal, Shyam Lal and Pyare Lal on unregistered bonds from 1902 till 1910 and from 1910 on registered mortgage bonds. He says that—

"They (that is to say, Har Devi, Mukand Ram, Kanhaiya Lal, Shyam Lal and Pyare Lal) showed one copy of a deed of will and said that Mst. Pato had given the property to her daughters and grandsons . . . . . . I am illiterate and Kanhaiya Lal brother of Mukand Ram had the deed of will read over to me at the time of mortgaging property in 1909 or 1910. It was by means of that paper that I came to know that Mst. Pato had made her daughters and grandsons absolute owners and I know of the property which was mortgaged to me".

Now it is true that the so-called will of 1864 does not make provision for the grandsons, not does it expressly confer an absolute estate on the legatees, but the witness is illiterate and had to depend on what he was told about the contents and meaning of the document, and what we have to test is the truth of his assertion that the plaintiff Mukand Ram and Kanhaiya Lal, and other members of the family, told him that Mst. Pato had given the property to her daughters and grandsons. If they told him this, as he says they did, then it operates as an admission against Mukand Ram and shifts the burden of proof to him because he was one of the persons who made the statement. The statements made by the others are not relevant except in so far as they prove the conduct of the family.

The plaintiff (P.W. 11 in C.A. 91/50) admits that Mst. Pato divided the estate but says that it was only for convenience of management and that neither she nor her daughters had, or pretended to have, anything more than a life estate. He denies that there was any gift or family arrangement. But he had to admit that the grandsons also got properties at the same time. His explanation is that it was for the purposes of "shradh" and pilgrimage to Gaya and he says that though they were given possession they were not the "owners".

We now have to choose between these two witnesses and see which is telling the truth. But before doing that we will advert to another member of the family, Pyare Lal, who was examined as a witness (D.W. 17) in C.A. 92/50. He admits a series of sales made by him but says that he had no will of his own and that he did just what Mukand Ram told him.

Now to go back to the year 1864 when Mst. Pato made the so-called will of 1864. This document was construed by the Privy Council in *Mst. Hardei* v. *Bhagwan Singh*[1] and their Lordships said—

"In the events which happened this document did not become operative, but it is relevant as showing that at the date of its execution Pato was claiming an absolute right to dispose of the whole of the scheduled property".

Mukand Ram was not a party to that litigation and the decision does not bind him but it operates as a judicial precedent about the construction of that document, a precedent with which we respectfully agree. She says there that the property "belongs exclusively to me without the participation of any one else". That

1. A.I.R. 1919 P.C. 27.

assertion, coupled with the fact that she purported to dispose of the property after her death (which she could not have done as a limited owner), and taken in conjunction with the subsequent conduct of the daughters and that of the grandsons, imports admissions by them that that was her claim and leaves us in little doubt about what she meant. We therefore reach the same conclusion as the Judicial Committee and hold that Mst. Pato claimed an absolute estate in 1864.

We will now examine the conduct of the family after Pato's death and the claims put forward by them from time to time. First, we have the statement of Mukand Ram in the witness box (P.W. 11 in C.A. 91/50) that on Pato's death her daughters took separate possession of the properties in the following villages and towns :

Har Devi	.. Qutabpur Amawti. Shakerpore. Lalpur. Bagh Alam Sarai. Houses, shops, etc. in Bazaar Kot, Sambhal.
Durga Devi	.. Keshopur Bhindi. Tatarpore Ghosi. Half Bilalpat. Qumharwala Bagh. Shehzadi Serai. Houses, shops, etc. in Sherkhan Serai, Sambhal.
Maha Devi	.. Guretha. Behrampur. Half Bilalpat. Mahmud Khan Serai. Houses, etc. in Kot. Grove in Alam Serai.

The plaintiff also admits that the grandsons got some properties but does not give details. All he says is that they were given properties "for purposes of performance of 'shradh' and pilgrimage to Gaya".

Next, we have a long series of alienations by different members of the family with claims to absolute ownership which could only have sprung from titles derived either from a gift from Pato or from a family settlement. We say "family settlement" because we know now that the bulk of the property (and according to the High Court the whole of it) was Nanak Chand's. We also know that some of it was purchased by Pato after Nanak Chand's death from the income of the estate. Pato had the right to purchase properties for herself if she wanted instead of adding them to her husband's estate and we know she claimed title to the whole as an absolute owner in 1864. This claim may have been due to a mistaken view of Hindu law that in the absence of sons the widow gets an absolute estate, or it may have been due to other reasons, but that she made the claim is clear, and the subsequent conduct and statements of the family show that they either admitted the correctness of her claim and accepted the properties as gifts from her or they agreed to and acted on a family settlement to avoid disputes on the basis that each got an absolute title to whatever properties fell to his or her share at the time of the division.

The grandsons were minors at the time and were not parties to this arrangement, whatever its origin, and of course the widow and daughters could not enlarge their limited estates so as to bind the gransdons however much they agreed among themselves. But for the moment we are not considering the legal effect of whatever the arrangement was but whether the conduct of the family gives rise to an inference that there was an arrangement in fact.

A family arrangement can, as a matter of law, be implied from a long course of dealings between the parties : *Clifton* v. *Cockburn*[1] and *William* v. *William*[2] ; and we have such a course of dealing here. First, there is a long series of alienations by Har Devi stretching from 1877 down to 1916. We tabulate them below with the recitals she made about her title :

1. (1835) 3 My. & K. 76. 2. (1866) L.R. 2 Ch. 294.

17-1-77	Mortgage	Qutabpur Amawti	" owned by me ".	Ex. LL-1 (C.A. 94)
11-1-78	do	do	Owner : " devolved on me from my mother ".	Ex. 2J1 (C.A. 91)
20-3-81	do	do	Owner : " right of inheritance from my father ".	Ex. 2H1 (C.A. 91)
7-9-83	Sale.	Lalpur	Owner : " right of inheritance ".	Ex. 2G1 (C.A. 91)
23-8-87	Mortgage	Qutabpur Amawti	No recital	Ex. L (C.A. 92)
15-7-05	do	do	Absolute owner with Kanhaiya Lal and Mukand Ram.	Ex. BB-1 (C.A. 94)
19-11-08	do	do	No recital	Ex. M-1 (C.A. 94)
14-11-14	do	do	do	Ex. V (C.A. 92)
23-3-15	do	do	Owner : with Mukand Ram	Ex. X (C.A. 92)
17-2-16	do	do	With Mukand Ram. No recital	Ex. N-1 (C.A. 94)
28-3-16	do	do	Owner : with Mukand Ram and his son Ram Gopal.	Ex. MM-1 (C.A. 94)
22-1-18	do	Behrampur Buzurg	Owner : with Mukand Ram and Bhukan Saran.	Ex. DDD 1 (C.A. 91)
23-3-18	do	do	Owner : with Mukand Ram and Pyare Lal.	Ex. M1 (C.A. 91)

It will be observed that Har Devi sometimes claimed to be absolute owner by right of inheritance from her father and at others from her mother in respect of the same village, but whichever way it was, the claim to absolute ownership was consistent throughout. This could only be referable to a family settlement where the origin of the property was in doubt but which was setttled by bestowing, or purporting to bestow, an absolute estate on the daughters.

It will also be noticed that in later years Har Devi joined with Mukand Ram but still claimed an absolute estate along with him. This was for the following reason. Soon after Mukand Ram attained majority, the mother and sons quarrelled. On 11th February, 1890, they referred their dispute to arbitration, Exhibit RR-1 (C.A. 94). Mukand Ram became a major in 1890 and Kanhaiya Lal in 1884. It appears from their agreement of 11th February, 1890, that Har Devi claimed an absolute title while her sons said she was only a limited owner. But the sons agreed to accept a decision to the effect that she had an absolute estate in the whole of the property in dispute between them should the arbitrator so decide. The properties were—

Qutabpur Amawti,

Shakerpore,

Houses, shops, etc., in Mohalla Kot in Sambhal.

Another significant thing is that in this document both mother and sons agreed that all of Nanak Chand's grandsons then in being were in separate possession and absolutely entitled to certain other properties which they expressly agreed were not to form the subject-matter of the arbitration. Here again, these titles could only be referable to a family arrangement, for the grandsons could not have got an absolute estate in any other way ; nor could Har Devi. Mukand Ram tells us as P.W.11 (C.A.91) that he and his brother Kanhaiya Lal got Shakerpore and some shops in Bazar Kot, Sambhal, as a result of this arbitration, but does not say what happened to Qutabpur Amawti. But it is significant that Har Devi's dealings with Qutabpur Amawti after this date were all jointly with Kanhaiya Lal and Mukand Ram. It may be that the arbitrator awarded it jointly or they agreed to hold it on that basis. We do not know. All we know is that they mortgaged it jointly.

Behrampur fell to Mukand Ram's share and in the mortgage of the property in 1918 Har Devi joined with Mukand Ram and Murari Lal's sons Bhukan

Saran in one case and with Pyare Lal in the other. But except for the last two mortgages of 1918 the conduct of Har Devi and her sons for 39 years from 1877 to 1916 as disclosed in these deeds is only consistent with the family arrangement which the defendants allege, for on no other hypothesis could either the mother or the sons have laid claim to an absolute estate.

We will next turn to Durga Devi. She died in 1888 but before she died she mortgaged Keshopur Bhindi which had fallen to her share on 3rd March, 1887, by Exhibit U-1 (C.A. 93) and claimed to be the owner.

Then there is Maha Devi. The only direct evidence we have of her conduct is a written statement that she filed in O.S. 177/1897, Exhibit 2B1 (C.A.91). She asserted there on 5th January, 1898, that she had been in proprietary possession and occupation of her divided share of the property obtained by her from her mother under a deed of will. The circumstances in which she made this statement are to be found in the judgment in that suit, Exhibit G1 (C.A. 91). The suit was by Har Devi against her sister and a transferee who claimed title through the other sister, Durga Devi. Har Devi's allegation was that Durga Devi had mortgaged Keshoper Bhindi and Tatarpore Ghosi on 3rd March, 1887. The mortgagee sued on his deed and obtained a decree for sale. In execution of the decree he purchased the properties himself. Durga Devi died in 1888 and Har Devi claimed that Durga Devi had only a limited estate and that Maha Devi and herself were entitled to the properties by survivorship. Maha Devi refused to support her sister and took up the position that each sister, or at any rate that she, Maha Devi, got an absolute estate in the property that came to her and of which she was placed in separate possession, from Pato. On 16th December, 1910, Maha Devi mortgaged Behrampur Buzurg and claimed that it belonged to her, being property left to her by her mother in which no one else had any rights. The deed is Exhibit BB-1 (C.A.93). On 2nd July, 1911, she sold Bilalpat and claimed to be its exclusive proprietor, Exhibit R-1/(C.A. 93).

We now come to two statements made by Har Devi and Maha Devi as witnesses in that suit. Strong exception was taken to their admissibility because the plaintiff was not a party to the earlier litigation. It is a moot point whether they would be admissible under section 32 (3) of the Evidence Act, but we need not decide that because we do not intend to use them as proof of the truth of the facts stated in them. But they are, in our view, admissible to show the conduct of these two ladies. The conduct of the various members of the family is relevant to show that their actings, viewed as a whole, suggest the existence of the family arrangement on which the defendants rely. At this distance of time gaps in evidence that would otherwise be available have to be filled in from inferences that would normally have little but corroborative value. But circumstanced as we are, inferences from the conduct of the family is all that can reasonably be expected in proof of an arrangement said to have been made in 1875. The statements that Har Devi and Maha Devi made as witnesses are therefore as relevant as recitals made by them in deeds and statements made by them in pleadings. They do not in themselves prove the fact in issue, namely the family arrangement, because, in the absence of section 32 (3), they are not admissible for that purpose, but as their conduct is relevant these statements are admissible as evidence of that conduct.

Maha Devi's Statement is Exhibit 2-A1 (C.A. 91) and Har Devi's Exhibit 2-F1 (C.A.91). Both speak of an arrangement effected by Pato in her life-time and say that they entered into separate possession of the properties by reason of that arrangement. Har Devi says in addition that the grandsons were included in the arrangement and given properties too. Therefore, we know that this is the title under which each claimed to hold in O.S. No. 177/1897. It is proof of their assertion of this title at that early date and though it is no proof of the truth of those assertions it is proof of the fact that the assertions were made and that is all we need at the moment.

We turn next to the conduct of the grandsons, and first we will consider the plaintiff Mukand Ram and his brother Kanhaiya Lal. The plaintiff attained

majority in 1890 and from that date down to 1922 we have a series of assertions of a title that can only spring from the family arrangement. First, we have the deed of 11th February, 1890, Exhibit, RR-1 (C.A.94) which we have already considered in connection with Har Devi. This is the agreement between this brother and himself on the one hand and Har Devi on the other to refer their dispute to arbitration. We have already commented on the fact that the two brothers asserted an absolute title to properties that were in their possession and acknowledged the absolute title of Pyare Lal and Shyam Lal to the properties of which they were possessed. The only dispute they were prepared to submit to arbitration was about the properties in Har Devi's possession and there, they were prepared to accept a decision upholding Har Devi's claim to an absolute estate.

After this came the following dealings :

20-11-91	Sale	Shahzadi Sarai	Proprietary possession "devolved on us by right of inheritance from Pato ".	Ex. 2K1 (C.A. 91)
28-7-93	Sale	Dugawar	Proprietary possession "by right of inheritance ".	Ex. 2E1 (C.A. 91)
2-7-96	Mortgage	Qutabpur Amawti	"ancestral and purchased by us": "possessed by us . . . . without the participation of anybody else ".	Ex. KK-1 (C.A. 94)
30-1-00	Sale	Bazar Mahmud Khan Sarai, Sambhal.	"proprietary possession" by "right of inheritance": "without the participation of anyone else ".	Ex. U (C.A. 92)
15-7-05	Mortgage	Qutabpur Amawti	Owners : with Har Devi "without the participation of anyone else ".	Ex. BB-1 (C.A. 94)

Kanbaiya Lal died about this time and thereafter Mukand Ram continued to make transfers claiming to do so in his own right. He made the following along with Har Devi. We have already analysed them. They were—

19-11-08	Ex.M1	(C.A.94)
14-11-14	Ex.V	(C.A.92)
23- 3-15	Ex.X	(C.A.92)
17- 2-16	Ex.N-1	(C.A.94)
28- 3-16	Ex.MM1	(C.A.94)
22- 1-18	Ex.DDD1	(C.A.91)
23- 3-18	Ex.M1	(C.A.91)

But in addition to these he made the following transfers on his own :

18-2-16	Sale	Lashkarpur	Absolute owner.	Ex. PP-1 (C.A. 94)
24-4-22	Sale	Houses, etc., in Sambhal.	do	Ex. Y (C.A. 92)
23-11-22	Sale	Qutabpur Amawti	do.	Ex. Q (C.A. 92)

Next, we come to Shyam Lal. His alienations weie as follows :—

19-6-97	Mortgage	Shops in Sambhal.	Owner	Ex. W-1 (C.A. 94)
9-11-07	do	House in Sambhal.	No recital	Ex. TT-1 (C.A. 94)
17-9-09	do	Bilalpat	do	Ex. UU-1 (C.A. 94)

In addition, he made the following transfers jointly with his brother Pyare Lal ;

18-1-06	Mortgage	Bilalpat and shops in Sambhal.	No recitals ..	Ex. EEE-1 (C.A. 94)
21-2-10	do	Bilalpat and Sabz.	do	Ex. AA-1 (C.A. 94)

Pyare Lal also made two transfers on his own—

23-9-18	Sale	Bilalpat	"Devolved on me" from Nanak Chand by right of inheritance.	Ex. 15 (C.A. 94)
2-1-20	do	do	do	Ex. 18 (C.A. 93)

Lastly, there is Bhukhan Saran, who is Maha Devi's daughter's son. He transferred as follows :

26-3-18	Sale	Houses, etc., Sambhal.	In absolute and exclusive owner.	Ex. MM-1 (C.A. 92)
9-1-21	Relinquishment.	Bilalpat	do	Ex. DD-1 (C.A. 93)

These documents disclose a long line of conduct on the part of the various members of the family and show that from 1877 down to 1922 each dealt with the properties in his or her possession as absolute owner and set up exclusive proprietary title to the properties transferred. It is true the source of title was not consistently stated, sometimes it was said to be Pato and at others Nanak Chand, but the assertion to a separate, exclusive and absolute title in each is common all through. There is only one way in which they could have got these exclusive titles and that is by a family arrangement, for whether the property was Nanak Chand's or whether it was Pato's, in neither event could any one of these persons have obtained an absolute estate on the dates with which we are concerned : the grandsons, because the reversion had not opened out; the daughters because, either way, they would only be limited owners under the Hindu Law. But if there was a family arrangement assented to by the daughters and later accepted and acted on by the sons when they attained majority, their claim to separate and independent absolute titles is understandable. It does not matter whether the claims were well founded in law because what we are considering at the moment is not the legal effect of the arrangement but whether there was one in fact.

Now, in spite of all these dealings, the conduct of Har Devi and Mukand Ram and Kanhaiya Lal was not always consistent. They were greedy and while insisting that they be allowed to hold on to what they had got, they wanted to snatch more if and when they could. The ball started rolling in 1890 as soon as Mukand Ram attained majority. There was the reference to arbitration in that year to settle their dispute with their mother Har Devi. But even there, there was the inconsistency regarding their own properties to which we have already referred. Mukand Ram's later explanation in the witness box that they got those properties for *shradh* purposes and for a pilgrimage to Gaya cannot be believed.

Next, there was the suit by Mukand Ram and Kanhaiya Lal against their aunt Maha Devi in 1895 : S. No. 21/1895, Exhibit 31 (C.A.91). That was occasioned by two sales by Maha Devi on 19th February, 1883 and 20th May, 1885. She stoutly maintained that she had an absolute title. The litigation had a chequered career and ultimately the suit was dismissed as barred by time.

Next came suit No. 177 of 1897, Exhibit G1 (C.A. 91,) in which Har Devi sued Maha Devi and a transferee. This time it was to set aside an alienation by Durga Devi, Durga Devi then being dead. Har Devi claimed that the property was Nanak Chand's and that the daughters were limited owners. But again Maha Devi stood by the family arrangement and asserted an absolute title in all the daughters; Exhibit 2B1 (C.A.91). We have seen that Har Devi entered the box and admitted the arrangement : Exhibit 2 F-1 (C.A. 91). The suit very naturally failed, but the result of the litigation is not relevant because the plaintiff was not a party. What we are examining is the conduct of Har Devi.

In 1913 Har Devi tried again after Maha Devi's death, this time against alienees from Maha Devi. This is the suit that went up to the Privy Council, *Mst. Hardei* v. *Bhagwan Singh*[1]. She failed again.

Having failed against Maha Devi in the 1897 litigation, Har Devi next tried her luck against Maha Devi's grandson (daughter's son) Bhukhan Saran, after Maha Devi's death. The suit is O.S. 52/14 Exhibit 78 (C.A.94). This time she succeeded with respect to some items and failed as regards the rest. But again the result is irrelevant : Exhibits 6 and 8 (C.A.94).

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1. A.I.R. 1919 P.C. 27.

Now what we are examining at the moment is whether Shyam Lal, D.W.1 in C.A.94, is to be believed when he says that Mukand Ram, among others, told him about the family arrangement under which Pato had divided all her property between her daughters and their sons. It is evident from what we have said above that Mukand Ram had been consistently asserting such a title for 31 years from 1891 to 1922 despite his aberrations in 1890 and 1895. In particular he did this whenever he wanted to borrow money or to sell property; and he makes a significant admission in the witness box as P.W. 11 in C.A. 91 that—

> " In the mortgage or sale of the property over which Mst. Har Devi was in possession none of her sisters or sisters' sons joined. Similarly, in the sale or transfer of the property that came to Durga Devi, none of her sisters or other sisters' sons joined ".

He also admits that there was a division and separate possession from 1876. He says that it was for convenience of management and says that it was after Pato's death, but in view of the mass of evidence that we have just analysed, we think it far more likely that he told Shyam Lal just what Shyam Lal says he did. After all, he was borrowing money from Shyam Lal on each of these occasions ; so there is every reason to believe that he would have told Shyam Lal what he had so repeatedly asserted to his other transferees. We accordingly believe Shyam Lal.

That at once shifts the burden of proof to the plaintiff, and what is his explanation? First, a division of the estate for convenience of management (but that does not explain the long chain of unchallenged transfers bar Har Devi's efforts in four cases) ; and second, that the grandsons got property absolutely for the purposes of Shradh and pilgrimage : (an explanation which we disbelieve.) We are therefore left with the plaintiff's admission to Shyam Lal and that admission, coupled with the conduct and actings of the family, firmly establishes the family arrangement. We accordingly hold that, whether the property belonged to Pato or to Nanak Chand, Pato claimed an absolute right which the daughters acknowledged, and in return they and their sons were given separate and absolute estates in separate portions of the property immediately.

This arrangement bound the daughters because they were parties to it and received good consideration. But so far as the sons are concerned, they were minors at that time and were not parties to this arrangement, for no one suggests that they were represented by guardians who entered into it on their behalf. Therefore, the properties they received were, so far as they are concerned, gifts pure and simple from Pato with the assent of her daughters. It does not matter whether the properties were Pato's exclusive properties or whether they came to her from her husband, because, either way, the title to the properties resided in her and she was the only person competent to pass it on to another. If her title was absolute, the sons get absolute estates. If it was the limited title of a Hindu widow, they obtained a limited title good during her life, and, as the daughters consented to the gifts and obtained properties for themselves as a result of the arrangement that resulted in these gifts, *they* would not be permitted to question the gifts ; and the Privy Council so held in Har Devi's suit against the alienees from Maha Devi : *Mst. Hardei* v. *Bhagwan Singh*[1]. But so far as the grandsons are concerned, *the mere fact* that each received a separate gift from Pato at a time when they were not competent to assent or to dissent would not *in itself* bind them. To achieve that result, there would have to be something more ; and it is to that something more that we will now direct our attention.

But before doing that, we will pause to distinguish *Rani Mewa Kuwar* v. *Rani Hulas Kuwar*[2] ; *Khunni Lal* v. *Gobind Krishna Narain*[3], and *Ramsumran Prasad* v. *Shyam Kumari*[4]. It is well settled that a compromise or family arrangement is based on the assumption that there is an antecedent title of some sort in the parties and the agreement acknowledges and defines what that title is, each party relinquishing all claims to property other than that falling to his share and recognising the right of the others, as they had previously asserted it, to the portions allotted to them respectively.

1. A.I.R. 1919 P.C. 27.
2. (1874) L.R. 1 I.A. 157 at 166.
3. (1911) 21 M.L.J. 645 : L.R. 38 I.A. 87 at 102 (P.C.).
4. (1922) 44 M.L.J. 751 : L.R. 49 I.A. 342 at 348 (P.C.).

That explains why no conveyance is required in these cases to pass the title from the one in whom it resides to the person receiving it under the family arrangement. It is assumed that the title claimed by the person receiving the property under the arrangement had always resided in him or her so far as the property falling to his or her share is concerned and therefore no conveyance is necessary. But, in our opinion, the principle can be carried further and so strongly do the Courts lean in favour of family arrangements that bring about harmony in a family and do justice to its various members and avoid, in anticipation, future disputes which might ruin them all, that we have no hesitation in taking the next step (fraud apart) and upholding an arrangement under which one set of members abandons all claim to all title and interest in all the properties in dispute and acknowledges that the sole and absolute title to all the properties resides in only one of their number (provided he or she had claimed the whole and made such an assertion of title) and are content to take such properties as are assigned to their shares as gifts pure and simple from him or her, or as a conveyance for consideration when consideration is present.

The legal position in such a case would be this. The arrangement or compromise would set out and define that the title claimed by *A* to all the properties in dispute was his absolute title as claimed and asserted by him and that it had always resided in him. Next, it would effect a transfer by *A* to *B*, *C* and *D* (the other members to the arrangement) of properties *X*, *Y* and *Z*; and thereafter *B*, *C* and *D* would hold their respective titles under the title derived from *A*. But in that event, the formalities of law about the passing of title by transfer would have to be observed, and now either registration or twelve years adverse possession would be necessary. But in the present case, we are dealing with an arrangement made in 1875 at a time when the Transfer of Property Act was not in force and no writing was required; and, as there is no writing, the Registration Act does not apply either. Therefore, the oral arrangement of 1875 would be sufficient to pass title in this way and that in our opinion, is what happened.

But these rules only apply to the parties to the settlement and to those who claim through or under them. They cannot be applied to the minor sons who were not parties either personally or through their guardians and who do not claim title either through Pato or her daughters. So far as they are concerned, what they received were gifts pure and simple and the only assent that could be inferred from *mere acceptance* of the gift and *nothing more* would be assent to that particular gift and not assent to the gifts similarly made to others; and for this reason.

When Mukand Ram attained majority he had two titles to choose from. One from Pato as a limited owner coupled with the assent of the daughters to her gift to him. In that case, he would hold a limited estate till the reversion opened out. The gift would be good during Pato's life-time because she had that title to convey, and thereafter, till the three daughters died, because they assented to it and obtained considerable benefit for themselves from the transaction out of which it arose. The other title would be an absolute one on the basis that Pato was the absolute owner of the properties. That title could only be referable to the family arrangement, and if Mukand Ram, knowing the facts, assented to the arrangement *ex post facto*, he will be precluded from challenging it for reasons which we shall now explain.

If the properties were Nanak Chand's, which is the assumption on which we are deciding this case, then Pato was a limited owner under the Hindu law, but as such she represented the estate and any title she conveyed, whether by gift or otherwise, would not be void; it would only be voidable. It would be good as against all the world except the reversioner who succeeded when the reversion opened out and he is the only person who would have the right to avoid it; and it would continue to be good until he chose to avoid it. Therefore, if he does not avoid it, or is precluded from doing so, either because of the law of limitation or by his own conduct, or for any other reason, then no one else can challenge it; and the law is that once a reversioner has given his assent to an alienation, whether at the time, or as a part of the transaction, or later as a distinct and separate act,

he is bound though others may not be, and having given his assent he cannot go back on it to the detriment of other persons ; all the more so when he himself receives a benefit : see *Raja Modhu Sudan Singh v. Rooke*[1] ; *Bijoy Gopal* v. *Krishna*[2], and *Ramgouda Annagouda* v. *Bhausaheb*[3]. Lord Sinha, delivering the judgment of the Privy Council in the last of these three cases, said at page 402—

> " It is settled law that an alienation by a widow in excess of her powers is not altogether void but only voidable by the reversioners, who may either *singly* or as a body be precluded from exercising their right to avoid it either by express ratification *or by acts which treat it as valid or binding* ".

This was followed in *Dhiyan Singh* v. *Jugal Kishore*[4] though the ground of that decision was estoppel. We are now founding on another principle which is not grounded on estoppel and which, indeed, is not peculiar to Hindu law.

Estoppel is rule of evidence which prevents a party from alleging and proving the truth. Here the plaintiff is not shut out from asserting anything. We are assuming in his favour that Pato had only a life estate and we are exmining at length his assertion that he did not assent to the family arrangement. The principle we are applying is therefore not estoppel. It is a rule underlying many branches of the law which precludes a person who, with full knowledge of his rights, has once elected to assent to a transaction voidable at his instance and has thus elected not to exercise his right to avoid it, from going back on that and avoiding it at a later stage. Having made his election he is bound by it.

So far as the Hindu law is concerned, Lord Dunedin explained in *Rangasami Gounden* v. *Nachiappa Gounden*[5], a case in which a widow gifted properties to her nephew, that though the reversioner is not called upon to exercise his right to avoid until the reversion falls in and so no assent can be inferred from mere inaction prior to the death or deaths of the limited owner or owners, he is not bound to wait and.

> " of course something might be done even before that time which amounted to an actual election to hold the deed good ".

Ramgouda's case[3] is an illustration of what that something can be, for there the assent was given by the ultimate reversioner *before* he became *in titulo* to alienations by a widow, one of which was a gift. The present case is another illustration. For the reasons we have given and which we shall now further examine, we hold that the plaintiff, who is *in titulo* now that the succession has opened out, unequivocally assented to the arrangement with full knowledge of the facts and accepted benefit under it, therefore, he is now precluded from avoiding it, and any attempts he made to go behind that assent when it suited his purpose cannot render the assent once given nugatory even though it was given when he was not *in titulo* and even though the assent was to a series of gifts.

The real question is whether the plaintiff assented to the family arrangement, and as the plaintiff was not a party to the arrangement his assent to the arrangement, itself, and not to something else, must be clearly established, and also his knowledge of the facts. But we think they have been. In the first place, there was the express assent in 1890 to the gifts made to the other grandsons on the basis that each grandson got an absolute estate. Next, there was the long course of dealings by Kanhaiya Lal and Mukand Ram in which they asserted absolute titles. Mukand Ram tells us in the witness box as P.W. 11 (C.A. 91) that Kanhaiya Lal was the karta of the joint family to which Mukand Ram belonged, therefore Kanhaiya Lal's dealings with the properties which he and his brother held under a joint and undivided title are also relevant as they will bind Mukand Ram. And lastly, there is Mukand Ram's representation to Shyam Lal (D.W.1 in C.A. 94) which leaves us in no doubt about his knowledge. The cumulative effect of this course of conduct leads to a reasonable inference that Kanhaiya Lal and Mukand Ram were holding, not on the basis of a separate and individual gift made by a life owner with the assent of the next set of life owners, but on the basis of the family arrangement which was

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1. (1897) 7 M.L.J. 127 : L.R. 24 I.A. 164 at 169 : I.L.R. 25 Cal. 1 (P.C.).
2. (1907) 17 M.L.J. 154 : L.R. 34 I.A. 87 (P.C.).
3. (1927) 53 M.L.J. 350 : L.R. 54 I.A. 396 : I.L.R. 52 Bom. 1 (P.C.).
4. (1952) S.C.J. 142 : 1952 S.C.R. 478 at 488.
5. (1918) 36 M.L.J. 493 : L.R. 46 I.A. 72 at 86 & 87 : I.L.R. 42 Mad. 523 (P.C.).

one composite whole in which the several dispositions formed parts of the same transaction under which Mukand Ram himself acquired a part of the estate : see *Ramgouda* v. *Bhausaheb*[1]. We are therefore satisfied that the plaintiff's assent was to this very arrangement; and that concludes both cases.

In C.A. 94/50 there is, in addition, a direct personal estoppel against the plaintiff. The transfers that are challenged there are sales of 23rd September, 1918 and 25th November, 1919, made *by two of the grandsons*, one personally and the other by the guardian, but the relevant dates for the purposes of the estoppel are later because the representation in this case was not made to the immediate transferees but to the first defendant who obtained title to the properties at a later date, in one case by a sale from the immediate transferee, in the other by pre-emption. But the exact dates do not matter because the representation to the first defendant was made in 1910 before the first defendant's purchases. It was made by Kanhaiya Lal and Muknda Ram as well as by other members of the family. We have already referred to the first defendant's evidence. This case would therefore be governed by *Dhiyan Singh* v. *Jugal Kishore*[2] in any event. But we need not elaborate this further because of the other principle which, in our opinion, is sufficient to dispose of both the present cases.

The result is that both appeals are allowed. The decrees of the High Court are set aside and those of the first Court dismissing the plaintiff's claims in those suits out of which Civil Appeals 92 and 94 of 1950 arise are restored. Costs here and in the High Court will be paid by the plaintiff-respondent but there will be only one set of costs and they will be divided half and half between the two sets of appellants.

G.R./K.S. —— *Appeals allowed.*

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT.—VIVIAN BOSE, B. JAGANNADHADAS AND B. P. SINHA, JJ.

Sangram Singh .. *Appellant**

v.

Election Tribunal, Kotah and another .. *Respondents.*

Representation of the People Act (XLIII of 1951), *section* 105—*Scope and effect—Does not take away or curtail jurisdiction of High Court under Articles* 136 *and* 226 *of the Constitution of India* (1950)—*Jurisdiction of High Court—When exercised.*

Civil Procedure Code (*V of* 1908), *Order* 9, *rules* 6 *and* 7 *and Order* 17, *rule* 2—*Scope*—Ex parte *proceedings —Subsequent appearance by party—Discretion of Court to allow—Right of party declared* ex parte *to appear subsequently.*

The jurisdiction of the High Court under Article 226 of the Constitution is not taken away of curtailed by section 105 of the Representation of the People Act of 1951 (which makes every order or the Tribunal final and conclusive). *Certiorari* will be issued when the Court or Tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice.

Hari Vishnu v. *Ahmad Ishaque*, (1955) S.C.J. 267; *Durga Shankar Mehta* v. *Raghuraj Singh* (1954) S.C.J. 731 : (1954) 2 M.L.J. 435 and *Raj krushna Bose* v. *Binod Kanungo*, (1954) S.C.J. 286 : (1954) 1 M.L.J. 489, followed.

The jurisdiction which Articles 226 and 136 of the Constitution confer entitles the High Court and the Supreme Court to examine the decisions of all Tribunals to see whether they have acted illegally. That jurisdiction cannot be taken away by a legislative device that purports to confer power on a tribunal to act illegally by enacting a statute that its illegal acts shall become legal the moment the tribunal chooses to say they are legal. But High Courts do not and should not act as Courts of appeal under Article 226. Their powers are purely discretionary and though no limit can be placed upon that discretion it must be exercised along recognised lines and not arbitrarily; and one of the limitations imposed by the Courts on themselves is that they will not exercise jurisdiction in this class of cases unless substantial injustice has ensued, or is likely to ensue. It is a sound exercise

1. (1927) 53 M.L.J. 350 : L.R. 54 I.A. 396 at 402 : I.L.R. 52 Bom. 1 (P.C.).

2. (1952) S.C.J. 142 : 1952 S.C.R. 478.

* Civil Appeal No. 214 of 1954. 22nd March, 1955.

of discretion to bear in mind the policy of the Legislature to have disputes about these special rights decided as speedily as may be. Therefore writ petitions should not be lightly issued in this class of case.

The Court's hands are not tied by an earlier *ex parte* order. The Court has the widest possible discretion to dispose of the suit or proceeding in one of the modes directed in that behalf by Order 9, or make such other order as it thinks fit. If the Court thinks that its hands are tied by Order 9, rule 7, then it is not exercising the discretion which the law says it should, in a given case, where interference may be called for.

[In the instant case it was found the Tribunal did not exercise its discretion because it considered that it had none and thought that until the *ex parte* order was set aside the defendant could not appear either personally or through counsel. As no good cause was shown for non-appearance the defendant could not be relegated to the position that he would have occupied if he had appeared at the earlier hearing; but he had a right to appear through counsel and take part in the proceedings from the stage at which they had been reached subject to such terms and conditions as the Tribunal might think fit to impose.]

Appeal from the Judgment and Order, dated the 17th July, 1953, of the Rajasthan High Court (Jaipur) in Civil Writ Application No. 128 of 1953.

R. K. Rastogi and *Ganpat Rai*, Advocates, for Appellant.

R. C. Prasad, Advocate for *S. L. Chhibber*, Advocate, for Respondent No. 2.

The Judgment of the Court was delivered by

Bose, J.—The second respondent Bhurey Lal filed an election petition under section 100 of the Representation of the People Act against the appellant Sangram Singh and two others for setting aside Sangram Singh's election.

The proceedings commenced at Kotah and after some hearings the Tribunal made an order on 11th December, 1952, that the further sittings would be at Udaipur from the 16th to the 21st March, 1953. It was discovered later that the 16th was a public holiday, so on 5th January, 1953, the dates were changed to " from the 17th March onwards " and the parties were duly notified.

On the 17th the appellant did not appear nor did any of the three counsel whom he had engaged, so the Tribunal proceeded *ex parte* after waiting till 1-15 P.M.

The Tribunal examined Bhurey Lal and two witnesses on the 17th, five more witnesses on the 18th and on the 19th the case was adjourned till the 20th.

On the 20th one of the appellant's three counsel, Mr. Bharat Raj, appeared but was not allowed to take any part in the proceedings because the Tribunal said that it was proceeding *ex parte* at that stage. Three more witnesses were then examined.

On the following day, the 21st, the appellant made an application asking that the *exparte* proceedings be set aside and asking that he be allowed to cross-examine those Bhurey Lal's witnesses whose evidence had already been recorded.

The Tribunal heard arguments and passed an order the same day rejecting the application on the ground that the appellant had

" failed to satisfy ourselves that there was any just or unavoidable reason preventing the appearance of Respondent No. 1 himself or of any of his three learned advocates between the 17th and the 19th of March, 1953 ",

and it added—

"at all events, when para. 10 of the affidavit makes it clear that Shri Bharatraj had already received instructions to appear on 17th March, 1953 there was nothing to justify his non-appearance on the 18th and 19th of March, 1953, if not, on the 17th as well ".

The appellant thereupon filed a writ petition under Article 226 of the Constitution in the High Court of Rajasthan and further proceedings before the Tribunal were stayed.

The High Court rejected the petition on 17th July, 1953, on two grounds—

" (1) In the first place, the Tribunal was the authority to decide whether the reasons were sufficient or otherwise and the fact that the Tribunal came to the conclusion that the reasons set forth by counsel for the petitioner were insufficient cannot be challenged in a petition of this nature " and

(2) " On the merits also, we feel no hesitation in holding that counsel for the petitioner were grossly negligent in not appearing on the date which had been fixed for hearing, more than two months previously ".

Five months later, on 16th December, 1953, the High Court granted a certificate under Article 133 (1) (*c*) of the Constitution for leave to appeal to this Court.

The only question before the High Court was whether the Tribunal was right in refusing to allow the appellant's counsel to appear and take part in the proceedings on and after the 20th of March, 1953 and the first question that we have to decide is whether that is sufficient ground to give the High Court jurisdiction to entertain a writ petition under Article 226 of the Constitution. That, in our opinion, is no longer *res integra.* The question was settled by a Bench of seven Judges of this Court in *Hari Vishnu* v. *Ahmad Ishaque*[1] in these terms :

" *Certiorari* will also be issued when the Court or Tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice ".

That is exactly the position here.

It was urged that that cannot be so in election matters because of section 105 of the Representation of the People Act of 1951 (Act XLIII of 1951), a section which was not considered in the earlier case. It runs thus—

" Every order of the Tribunal made under this Act shall be final and conclusive ".

It was argued that neither the High Court nor the Supreme Court can itself transgress the law in trying to set right what it considers is an error of law on the part of the Court or Tribunal whose records are under consideration. It was submitted that the Legislature intended the decisions of these tribunals to be final on *all* matters, whether of fact or of law, accordingly, they cannot be said to commit an error of law when, acting within the ambit of their jurisdiction, they decide and lay down what the law is, for in that sphere their decisions are absolute, as absolute as the decisions of the Supreme Court in its own sphere. Therefore, it was said, the only question that is left open for examination under Article 226 in the case of an Election Tribunal is whether it acted within the scope of its jurisdiction.

But this, also, is no longer open to question. The point has been decided by three Constitution Benches of this Court. In *Hari Vishnu* v. *Ahmad Ishaque*[1], the effect of section 105 of the Representation of the People Act was not considered, but the Court laid down in general terms that the jurisdiction under Article 226 having been conferred by the Constitution, limitations cannot be placed on it except by the Constitution itself : *see* pages 238 and 242. Section 105 was, however, considered in *Durga Shankar Mehta* v. *Raghuraj Singh*[2] and it was held that that section cannot cut down or affect the overriding powers of this Court under Article 136. The same rule was applied to Article 226 in *Raj Krushna Bose* v. *Binod Kanungo and others*[3] and it was decided that section 105 cannot take away or whittle down the powers of the High Court under Article 226. Following those decisions we hold that the jurisdiction of the High Court under Article 226 is not taken away or curtailed by section 105.

The jurisdiction which Articles 226 and 136 confer entitles the High Courts and this Court to examine the decisions of all Tribunals to see whether they have acted illegally. That jurisdiction cannot be taken away by a legislative device that purports to confer power on a tribunal to act illegally by enacting a statute that its illegal acts shall become legal the moment the tribunal chooses to say they are legal. The legality of an act or conclusion is something that exists outside and apart from the decision of an inferior tribunal. It is a part of the law of the land which cannot be finally determined or altered by any tribunal of limited jurisdiction. The High Courts and the Supreme Court alone can determine what the

1. (1955) S.C.J. 267 : A.I.R. 1955 S.C. 233, 249.
2. (1954) S.C.J. 731: (1954) 2 M.L.J. 435: A.I.R. 1954 S.C. 520, 522.
3. (1954) S.C.J. 286 : (1954) 1 M.L.J. 489 : 1954 S.C.R. 913, 918. (S.C.).

law of the land is *vis a vis* all other Courts and tribunals and they alone can pronounce with authority and finality on what is legal and what is not. All that an inferior tribunal can do is to reach a tentative conclusion which is the subject to review under Articles 226 and 136. Therefore, the jurisdiction of the High Courts under Article 226 with that of the Supreme Court above them remains to its fullest extent despite section 105.

That, however, is not to say that the jurisdiction will be exercised whenever there is an error of law. The High Courts do not, and should not, act as Courts of appeal under Article 226. Their powers are purely discretionary and though no limits can be placed upon that discretion it must be exercised along recognised lines and not arbitrarily; and one of the limitations imposed by the Courts on themselves is that they will not exercise jurisdiction in this class of case unless substantial injustice has ensued, or is likely to ensue. They will not allow themselves to be turned into Courts of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense, for, though no Legislature can impose limitations on these constitutional powers it is a sound exercise of discretion to bear in mind the policy of the Legislature to have disputes about these special rights decided as speedily as may be. Therefore, writ petitions should not be lightly entertained in this class of case.

We now turn to the decision of the Tribunal. The procedure of these tribunals is governed by section 90 of the Act. The portion of the section that is relevant here is sub-section (2) which is in these terms :

> " Subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the Tribunal, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 (Act V of 1908) to the trial of suits ".

We must therefore direct our attention to that portion of the Civil Procedure Code that deals with the trial of suits.

Now a code of procedure must be regarded as such. It is *procedure*, something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to *both* sides) lest the very means designed for the furtherance of justice be used to frustrate it.

Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle.

The existence of such a principle has been doubted, and in any event was condemned as unworkable and impractical by O'Sullivan J. in *Hariram* v. *Pribhdas*[1]. He regarded it as an indeterminate term "liable to cause misconception" and his views were shared by Wanchoo, C.J. and Bapna, J. in Rajastan : *Sewa Ram* v. *Misrimal*[2]. But that a law of natural justice exists in the sense that a party must be heard in a Court of law, or at any rate be afforded an opportunity to appear and defend himself, unless there is express provision to the contrary, is, we think, beyond dispute. See the observations of the Privy Council in *Balakrishna Udayar* v. *Vasudeva Ayyar*[3], and especially in *T. M. Barret* v. *African Products, Ltd.*[4] where Lord Buckmaster said—

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1. A.I.R. 1945 Sind 98, 102.
2. A.I.R. 1952 Raj. 12, 14.
3. (1917) 33 M.L.J. 69 : L.R. 44 I.A. 261 : I.L.R. 40 Mad. 793, 800 (P.C.).
4. A.I.R. 1928 P.C. 261, 262.

"no forms or procedure should ever be permitted to exclude the presentation of a litigant's defence".

Also *Hari Vishnu's case*[1] which we have just quoted.

In our opinion, Wallace, J. was right in *Venkatasubbiah* v. *Lakshminarasimham*[2] in holding that—

"One cardinal principle to be observed in trials by a Court obviously is that a party has a right to appear and plead his cause on all occasions when that cause comes on for hearing",

and that—

"It follows that a party should not be deprived of that right and in fact the Court has no option to refuse that right, *unless the Code of Civil Procedure deprives him of it*".

Let us now examine that Code; and first, we will turn to the body of the Code. Section 27 provides that

"Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim".

Section 30 gives the Court power to

"(*b*) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid".

Then come the penalties for default. They are set out in section 32 but they are confined to cases in which a summons has been issued *under section* 30. There is no penalty for a refusal or an omission to appear in response to a summons under section 27. It is true certain consequences will follow if a defendant does not appear and, popularly speaking, those consequences may be regarded as the penalty for non-appearance, but they are not penalties in the true sense of the term. They are not punishments which the Court is authorised to administer for disregard of its orders. The antithesis that section 32 draws between section 27 and section 30 is that an omission to appear in response to a summons under section 27 carries no penalty in the strict sense, while disregard of a summons under section 30 may entail punishment. The spirit of this distinction must be carried over to the First Schedule. We deprecate the tendency of some Judges to think in terms of punishments and penalties properly so called when they should instead be thinking of compensation and the avoidance of injustice to both sides.

We turn next to the Rules in the First Schedule. It is relevant to note that the Rules draw a distinction between the first hearing and subsequent hearings, and that the first hearing can be either (*a*) for settlement of issues only, or (*b*) for final disposal of the suit.

First, there is Order 5, rule 1 :

" . . . . a summons may be issued to the defendant to appear and answer the claim *on a day to be therein specified*".

This summons must state whether the hearing is to be for settlement of issues only or for final hearing (rule 5). If it is for final hearing, then (rule 8),

"it shall also direct the defendant to produce, *on the day fixed for his appearance*, all witnesses upon whose evidence he intends to rely in support of his case".

Then comes Order 8, rule 1, which expressly speaks of "the first hearing". Order 9 follows and is headed "Appearance of parties and consequence of non-appearance".

Now the word "consequence" as opposed to the word "penalty" used in section 32 is significant. It emphasises the antithesis to which we have already drawn attention. So also in rule 12 the marginal note is "Consequence of non-attendance" and the body of the rule states that the party who does not appear and cannot show sufficient cause,

"shall be subject to all the provisions of the foregoing rules applicable to plaintiffs and defendants, respectively, who do not appear".

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1. 1955 S.C.J. 267: A.I.R. 1955 S.C. 233, 249.
2. (1925) 49 M.L.J. 273 : A.I.R. 1925 Mad. 1274.

The use of the word "penalty" is scrupulously avoided.

Our attention was drawn to rule 6 (2) and it was argued that Order 9 does contemplate the imposition of penalties. But we do not read this portion of the rule in that light. All that the plaintiff has to do here is to pay the costs occasioned by the postponement which in practice usually means the cost of a fresh summons and the diet money and so forth of such of the witnesses as are present; and these costs the plaintiff must pay irrespective of the result.

Rule 1 of Order 9 starts by saying—

"*On the day fixed in the summons* for the defendant to appear and answer . . . . "

and the rest of the rules in that Order are consequential on that. This is emphasised by the use of the word "postponement" in rule 6 (1) (*c*), of "adjournment" in rule 7 and of "adjournment" in rule 1. Therefore, we reach the position that Order 9, rule 6 (1) (*a*), which is the rule relied on, is confined to the first hearing of the suit and does not *per se* apply to subsequent hearings : see *Sahibzada Zeinulabdin Khan* v. *Sahibzada Ahmed Raza Khan* [1].

Now to analyse rule 6 and examine its bearing on the first hearing. When the plaintiff appears and the defendant does not appear when the suit is called on for hearing, if it is proved that the summons was duly served— .

"(*a*) . . . . the Court may proceed *ex parte*".

The whole question is, what do these words mean? Judicial opinion is sharply divided about this. On the one side is the view propounded by Wallace, J. in *Venkatasubbiah* v. *Lakshminarasimham* [2] that *ex parte* merely means in the absence of the other party, and on the other side is the view of O'Sullivan, J. in *Hariram* v. *Pribhdas* [3] that it means that the Court is at liberty to proceed without the defendant till the termination of the proceedings unless the defendant shows good cause for his non-appearance. The remaining decisions, and there are many of them, take one or the other of those two views.

In our opinion, Wallace, J. and the other Judges who adopt the same line of thought, are right. As we have already observed our laws of procedure are based on the principle that, as far as possible, no proceeding in a Court of law should be conducted to the detriment of a person in his absence. There are of course exceptions, and this is one of them. When the defendant has been served and has been afforded an opportunity of appearing, then, if he does not appear, the Court may proceed in his absence. But, be it noted, the Court is not directed to make an *ex parte* order. Of course the fact that it is proceeding *ex parte* will be recorded in the minutes of its proceedings but that is merely a statement of the fact and is not an order made against the defendant in the sense of an *ex parte* decree or other *ex parte* order which the Court is authorised to make. All that rule 6 (1) (*a*) does is to remove a bar and no more. It merely authorises the Court to do that which it could not have done without this authority, namely to proceed in the absence of one of the parties. The contrast in language between rule 7 and 13 emphasises this.

Now, as we have seen, the first hearing is either for the settlement of issues or for final hearing. If it is only for the settlement of issues, then the Court cannot pass an *ex parte* decree on that date because of the proviso to Order 15, rule 3 (1) which provides that that can only be done when

"the parties or their pleaders are present and none of them objects".

On the other hand, if it is for final hearing, an *ex parte* decree can be passed, and if it is passed, then Order 9, rule 13 comes into play and before the decree is set aside the Court is required to *make an order to set it aside*. Contrast this with rule 7 which does not require the setting aside of what is commonly, though erroneously, known as "the *ex parte* order". No order is contemplated by the Code and therefore no order to set aside the order is contemplated either. But a decree is a command

1. (1878) L.R. 5 I.A. 233, 236.
2. (1925) 49 M.L.J. 273 : A.I.R. 1925 Mad. 1274.
3. A.I.R. 1945 Sind 98, 102.

or order of the Court and so can only be set aside by another order made and recorded with due formality.

Then comes rule 7 which provides that if at *an adjourned hearing* the defendant appears and shows good cause for his "*previous* non-appearance", he can be heard in answer to the suit

" as if he had appeared on the day fixed for his appearance ".

This cannot be read to mean, as it has been by some learned Judges, that he cannot be allowed to appear at all if he does not show good cause. All it means is that he cannot be relegated to the position he would have occupied if he had appeared.

We turn next to the *adjourned* hearing. That is dealt with in Order 17. Rule 1 (1) empowers the Court to adjourn the hearing and whenever it does so it must fix a day "for the further hearing of the suit", except that once the hearing of the evidence has begun it must go on from day to day till all the witnesses in attendance have been examined unless the Court considers, for reasons to be recorded in writing, that a further adjournment is necessary. Then follows rule 2—

" Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order 9 or make such other order as it thinks fit ".

Now rule 2 only applies when one or both of the parties do not appear *on the day fixed for the adjourned hearing*. In that event, the Court is thrown back to Order 9 with the additional power to make "such order as it thinks fit". When it goes back to Order 9 it finds that it is again empowered to proceed *ex parte* on the adjourned hearing in the same way as it did, or could have done, if one or other of the parties had not appeared at the first hearing, that is to say, the right to proceed *ex parte* is a right which accrues from day to day because at each adjourned hearing the Court is thrown back to Order 9, rule 6. It is not a mortgaging of the future but only applies to the particular hearing at which a party was afforded the chance to appear and did not avail himself of it. Therefore, if a party does appear on " the day to which the hearing of the suit is adjourned", he cannot be stopped from participating in the proceedings simply because he did not appear on the first or some other hearing.

But though he has the right to appear at an adjourned hearing, he has no right to set back the hands of the clock. Order 9, rule 7 makes that clear. Therefore, unless he can show good cause, he must accept all that has gone before and be content to proceed from the stage at which he comes in. But what exactly does that import? To determine that it will be necessary to hark back to the first hearing.

We have already seen that when a summons is issued to the defendant it must state whether the hearing is for the settlement of issues only or for the final disposal of the suit (Order 5, rule 5). In either event, Order 8, rule 1 comes into play and if the defendant does not present a written statement of his defence, the Court can insist that he shall; and if, on being required to do so, he fails to comply—

" the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit ". (O. 8, r. 10).

This invests the Court with the widest possible discretion and enables it to see that justice is done to *both* sides; and also to witnesses if they are present: a matter on which we shall dwell later.

We have seen that if the defendant does not appear at the first hearing, the Court can proceed *ex parte*, which means that it can proceed without a written statement; and Order 9, rule 7 makes it clear that unless good cause is shown the defendant cannot be relegated to the position that he would have occupied if he had appeared. That means that he cannot put in a written statement unless he is allowed to do so, and if the case is one in which the Court considers a written statement should have been put in, the consequences entailed by Order 8, rule 10 must be suffered. What those consequences should be in a given case is for the Court, in the exercise of its judicial discretion, to determine. No hard and fast

rule can be laid down. In some cases an order awarding costs to the plaintiff would meet the ends of justice : an adjournment can be granted or a written statement can be considered on the spot and issues framed. In other cases, the ends of justice may call for more drastic action.

Now when we speak of the ends of justice, we mean justice not only to the defendant and to the other side but also to witnesses and others who may be inconvenienced. It is an unfortunate fact that the convenience of the witness is ordinarily lost sight of in this class of case and yet he is the one that deserves the greatest consideration. As a rule, he is not particularly interested in the dispute but he is vitally interested in his own affairs which he is compelled to abandon because a Court orders him to come to the assistance of one or other of the parties to a dispute. His own business has to suffer. He may have to leave his family and his affairs for days on end. He is usually out of pocket. Often he is a poor man living in an out of the way village and may have to trudge many weary miles on his feet. And when he gets there, there are no arrangements for him. He is not given accommodation ; and when he reaches the Court, in most places there is no room in which he can wait. He has to loiter about in the verandahs or under the trees, shivering in the cold of winter and exposed to the heat of summer, wet and miserable in the rains : and then, after wasting hours and sometimes days for his turn, he is brusquely told that he must go back and come again another day. Justice strongly demands that this unfortunate section of the general public compelled to discharge public duties, usually at loss and inconvenience to themselves, should not be ignored in the over all picture of what will best serve the ends of justice and it may well be a sound exercise of discretion in a given case to refuse an adjournment and permit the plaintiff to examine the witnesses present and not allow the defendant to cross-examine them, still less to adduce his own evidence. It all depends on the particular case. But broadly speaking, after all the various factors have been taken into consideration and carefully weighed, the endeavour should be to avoid snap decisions and to afford litigants a real opportunity of fighting out their cases fairly and squarely. Costs will be adequate compensation in many cases and in others the Court has almost unlimited discretion about the terms it can impose provided always the discretion is judicially exercised and is not arbitrary.

In the Code of 1859 there was a provision (section 119) which said that—

> "No appeal shall lie from a judgment passed *ex parte* against a defendant who has not appeared."

The Privy Council held in *Zeinulabdin Khan* v. *Ahmed Raza Khan*[1] that this only applied to a defendant who had not appeared at all at any stage, therefore, if once an appearance was entered, the right of appeal was not taken away. One of the grounds of their decision was that—

> " The general rule is that an appeal lies to the High Court from a decision of a civil or subordinate Judge, and a defendant ought not to be deprived of the right of appeal, except by express words or necessary implication ".

The general rule, founded on principles of natural justice, that proceedings in a Court of justice should not be conducted behind the back of a party in the absence of an express provision to that effect is no less compelling. But that apart. It would be anomalous to hold that the efficacy of the so-called *ex parte* order expends itself in the first Court and that thereafter a defendant can be allowed to appear in the appellate Court and can be heard and can be permitted to urge in that Court the very matters he is shut out from urging in the trial Court ; and in the event that the appellate Court considers a remand necessary he can be permitted to do the very things he was precluded from doing in the first instance without getting the *ex parte* order set aside under Order 9, rule 7.

Now this is not a case in which the defendant with whom we are concerned did not appear at the first hearing. He did. The first hearing was on 11th December, 1952, at Kotah. The appellant (the first defendant) appeared through counsel and filed a written statement. Issues were framed and the case was adjourned till

1. (1878) L.R. 5 I.A. 233 : I.L.R. 2 All. 67 (P.C.).

the 16th March at Udaipur for the *petitioner's* evidence *alone* from the 16th to the 21st March. Therefore Order 9, rules 6 and 7 do not apply in terms. But we have been obliged to examine this Order at length because of the differing views taken in the various High Courts and because the contention is that Order 17, rule 2 throws one back to the position under Order 9, rules 6 and 7, and there, according to one set of views, the position is that once an *ex parte* "order" is passed" against a defendant he cannot take further part in the proceedings unless he gets that "order" set aside by showing good cause under rule 7. But that is by no means the case.

If the defendant does not appear at the adjourned hearing (irrespective of whether or not he appeared at the first hearing) Order 17, rule 2 applies and the Court is given the widest possible discretion either

> " to dispose of the suit in one of the modes directed in that behalf by Order 9 *or make such other order as it thinks fit* ".

The point is this. The Court has a discretion which it must exercise. Its hands are not tied by the so-called *ex parte* order ; and if it thinks they are tied by Order 9, rule 7, then it is not exercising the discretion which the law says it should and, in a given case, interference may be called for.

The learned Judges who constituted a Full Bench of the Lucknow Chief Court (*Thulsha Devi* v. *Sri Krishna*[1]) thought that if the original *ex parte* order did not enure throughout all future hearings it would be necessary to make a fresh *ex parte* order at each succeeding hearing. But this proceeds on the mistaken assumption that an *ex parte* order is required. The order sheet, or minutes of the proceedings, has to show which of the parties were present and if a party is absent the Court records that fact and then records whether it will proceed *ex parte* against him, that is to say, proceed in his absence, or whether it will adjourn the hearing ; and it must necessarily record this fact at every subsequent hearing because it has to record the presence and absence of the parties at each hearing. With all due deference to the learned Judges who hold this view, we do not think this is a grave or a sound objection.

A much weightier consideration is that the plaintiff may be gravely prejudiced in a given case because, as the learned Rajasthan Judges point out, and as O' Sullivan, J., thought, when a case proceeds *ex parte*, the plaintiff does not adduce as much evidence as he would have if it had been contested. He contents himself with leading just enough to establish a *prima facie* case. Therefore, if he is suddenly confronted with a contest after he has closed his case and the defendant then comes forward with an army of witnesses he would be taken by surprise and gravely prejudiced. That objection is, however, easily met by the wide discretion that is vested in the Court. If it has reason to believe that the defendant has by his conduct misled the plaintiff into doing what these learned Judges apprehend, then it might be a sound exercise of discretion to shut out cross-examination and the adduction of evidence on the defendant's part and to allow him only to argue at the stage when arguments are heard. On the other hand, cases may occur when the plaintiff is not, and ought not to be, misled. If these considerations are to weigh, then surely the sounder rule is to leave the Court with an unfettered discretion so that it can take every circumstance into consideration and do what seems best suited to meet the ends of justice in the case before it.

In the present case, we are satisfied that the Tribunal did not exercise its discretion because it considered that it had none and thought that until the *ex parte* order was set aside the defendant could not appear either personally or through counsel. We agree with the Tribunal, and with the High Court, that no good cause was shown and so the defendant had no right to be relegated to the position that he would have occupied if he had appeared on 17th March, 1953, but that he had a right to appear through counsel on 20th March, 1953 and take part in the proceedings from the stage at which they had then reached, *subject to such terms and conditions as the Tribunal might think fit to impose*, is, we think, undoubted.

1. A.I.R. 1949 Oudh 59 (F.B.).

Whether he should have been allowed to cross-examine the three witnesses who were examined after the appearance of his counsel, or whether he should have been allowed to adduce evidence, is a matter on which we express no opinion, for that has to depend on whatever view the Tribunal in a sound exercise of judicial discretion will choose to take of the circumstances of this particular case, but we can find no justification for not at least allowing counsel to argue.

Now the Tribunal said on 23rd March, 1953—

"The exact stage at which the case had reached before us on the 21st of March, 1953 was that under the clear impression that respondent No. 1 had failed to appear from the very first date of the final hearing when the *ex parte* order was passed, the petitioner must have closed his case after offering as little evidence as he thought was just necessary to get his petition disposed of *ex parte*. Therefore, to allow the respondent No. 1 to step in now would certainly handicap the petitioner and would amount to a bit of injustice which we can neither contemplate nor condone".

But this *assumes* that the petitioner was misled and closed his case "after offering as little evidence as he thought was just necessary to get his petition disposed of *ex parte*". It does not decide that that was in fact the case. If the defendant's conduct really gave rise to that impression and the plaintiff would have adduced more evidence than he did, the order would be unexceptional but until that is found to be the fact a mere assumption would not be a sound basis for the kind of discretion which the Court must exercise in this class of case after carefully weighing *all* the relevant circumstances. We, therefore, disagreeing with the High Court which has upheld the Tribunal's order, quash the order of the Tribunal and direct it to exercise the discretion vested in it by law along the lines we have indicated. In doing so the Tribunal will consider whether the plaintiff was in fact misled or could have been misled if he had acted with due diligence and caution. It will take into consideration the fact that the defendant did enter an appearance and did file a written statement and that issues were framed in his presence; also that the case was fixed for the "petitioner's" evidence only and not for that of the appellant; and that the petitioner examined all the witnesses he had present on the 17th and the 18th and did not give up any of them; that he was given an adjournment on 19th March, 1953 for the examination of witnesses who did not come on that date and that he examined three more on 20th March, 1953 after the defendant had entered an appearance through counsel and claimed the right to plead; also whether, when the appellant's only protest was against the hearings at Udaipur on dates fixed for the petitioner's evidence alone, it would be legitimate for a party acting with due caution and diligence to assume that the other side had abandoned his right to adduce his own evidence should the hearing for that be fixed at some other place or at some other date in the same place.

The Tribunal will also consider and determine whether it will be proper in the circumstances of this case to allow the appellant to adduce his own evidence.

The Tribunal will now reconsider its orders of the 20th, the 21st and the 23rd of March, 1953, in the light of our observations and will proceed accordingly.

The records will be sent to the Election Commission with directions to that authority to reconstitute the Tribunal, if necessary, and to direct it to proceed with this matter along the lines indicated above.

There will be no order about costs.

Orders quashed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT :—VIVIAN BOSE, B. JAGANNADHADAS AND B. P. SINHA, JJ.

Seth Thawardas Pherumal .. *Appellant**

v.

The Union of India .. *Respondent.*

Arbitration Act (X of 1940), section 16 (1) (c)—Objection to legality of award apparent upon the face of it —Power of Court to remit award for reconsideration—Error of law.

Section 16 (1) (*c*) of the Arbitration Act, 1940, empowers the Court to remit an award for reconsideration where an objection to the legality of the award is apparent upon the face of it. This covers cases in which an error of law appears on the face of the award. But in determining what such an error is, a distinction must be drawn between cases in which a question of law is specifically referred and those in which a decision on a question of law is incidentally material (however necessary) in order to decide the question actually referred. If the question of law is specifically referred and it is evident that the parties desire to have a decision from the arbitrator about that rather than one from the Courts, then the Courts will not interfere.

An arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. He is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not, he can be set right by the Courts provided his error appears on the face of the award. The single exception to this is when the parties choose *specifically* to refer a question of law as a separate and distinct matter. In the absence of a specific reference about the construction of a contract the jurisdiction of the Courts was not taken away.

[In the instant case it was found that there was an error apparent on the face of the award and the Court could set it right.]

Appeal from the Judgment and Decree, dated the 11th day of May, 1951, of the High Court of Judicature at Patna in Miscellaneous Appeal No. 253 of 1950 and in appeal from Original Order No. 252 of 1950 arising out of the order, dated the 11th day of March, 1950, of the Court of Subordinate Judge, Dhanbad, in Suit No. 34 of 1949 and Title Suit No. 27 of 1949.

Mahabir Prasad, Advocate-General for the State of Bihar (*S. P. Varma and M. M. Sinha*, Advocates, with him) for Appellant (*In Civil Appeal No.* 260 of 1953).

Mahabir Prasad, Advocate-General for the State of Bihar (*M. M. Sinha* for *R. C. Prasad*, Advocate, with him) (*In Civil Appeal No.* 12 of 1954).

C. K. Daphtary, Solicitor-General of India (*Porus A. Mehta* and *P. G. Gokhale*, Advocates, with him) for Respondent (*In both the Appeals*).

The Judgment of the Court was delivered by—

Bose, J.—This appeal and Civil Appeal No. 12 of 1954, which will also be governed by this judgment, raise the same points though there are some differences in the facts. We will deal with Civil Appeal No. 260 of 1953 first.

The suit there related to an arbitration matter. The appellant before us, whom it will be convenient to call the contractor, entered into a contract with the Dominion of India through an Additional Chief Engineer of the C.P.W.D. on 1st November, 1945, for the supply of bricks to the C.P.W.D., a department of the Dominion Government. Disputes arose about a number of matters. Clause 14 of the agreement provided that all disputes arising out of or relating to the contract should be referred to the Superintending Engineer of the Circle for the time being. Accordingly, there was a reference on 21st January, 1949 and an award followed on 8th May, 1949. It was filed in the Court of the Subordinate Judge, Dhanbad, and the contractor prayed that it be accepted and that a decree be passed in terms of it. The Dominion of India filed objections under section 30 of the Arbitration Act, 1940, that the award be set aside and alternatively that it be modified or corrected. The contractor's application was registered as a suit under section 20 (2) of the Act and a decree was passed in terms of the award on 18th March, 1950.

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* Civil Appeals Nos. 260 of 1953 & 12 of 1954. 24th March, 1955.

By that time the Constitution had come into force and the Union of India replaced the Dominion of India as a defendant. The Union of India filed an appeal to the High Court. The appeal was allowed in part. The contractor thereupon appealed to this Court.

The dispute that was referred to the arbitrator consisted of 17 heads of claim but only three of them are contested here, namely items 5, 8 and 17.

In the 5th head of claim the contractor claimed Rs. 75,900 as the price of 88 lacs of katcha bricks that were destroyed by rain. These bricks were not the subject-matter of the contract but the contractor put his claim in this way.

The contract was for the supply of 2½ crores of pucca bricks which had to be delivered according to the following schedule—

30 lacs by 25-1-46.
50 lacs by 25-2-46.
55 lacs by 25-3-46.
55 lacs by 25-4-46.
60 lacs by 25-5-46.

Delivery was to be at the kiln site. In order to keep to this schedule the contractor had to think ahead and work to a particular time table. First, he had to prepare katcha or unbaked bricks and place them in his kilns for baking. While this lot was baking he had to prepare and stock another lot of katcha bricks ready to take the place of the baked bricks as soon as they were removed. It was the duty of the C.P.W.D. to remove these bricks as soon as they were ready for delivery, that is to say, as soon as they were fully baked. At a certain stage of the contract the C.P.W.D. failed to remove the baked bricks which were ready for delivery and removal. This caused a jam in the kilns and prevented the contractor from placing a fresh a stock of unburnt bricks in the kilns, and in the meanwhile his stock-pile of katcha bricks ready for baking kept on mounting up. Had everything been done to time the 2½ crores of bricks would have been delivered before the rains set in. But owing to the default of the C.P.W.D. in not removing the burnt bricks which were ready for removal, delay occurred in the time table and the rains set in with the result that 88 lacs of katcha bricks were destroyed by the rains. As this loss was occasioned by the default of the C.P.W.D. the contractor claimed that he should be paid their price.

The reply of the Union Government was two-fold. First, it contended that the katcha bricks formed no part of the contract and even if it was at fault in not taking delivery of the burnt bricks in time all that it could be held liable for would be for breach of that contract; and said that the loss that was occasioned by the damage caused to the katcha bricks which formed no part of the contract was too remote. Secondly, that compensation for this loss could not in any event be claimed because this kind of situation was envisaged by the parties when the contract was made and they expressly stipulated that the Dominion Government would not be responsible. The Union Government relied on additional clause 6 of the agreement which is in these terms :

"The department will not entertain any claim for idle labour or for damage to unburnt bricks *due to any cause whatsoever*".

The arbitrator held that this clause was not meant " to absolve the department from carrying out their part of the contract" and so he awarded the contractor Rs. 64,075 under this head.

We are clear that the arbitrator went wrong in law. Government departments have their difficulties no less than contractors. There is trouble with labour, there is the likelihood of machinery breaking down in out of the way places and so forth; there was also the danger of thunderstorms and heavy showers of rain in the month of May : it will be remembered that the last date of delivery was 25th May, 1946. If, with that in view, Government expressly stipulated, and the contractor expressly agreed, that Government was not to be liable for any loss occasioned by a consequence

as remote as this, then that is an express term of the contract and the contractor must be tied down to it. If he chose to contract in absolute terms that was his affair. But having contracted he cannot go back on his agreement simply because it does not suit him to abide by it. This is not to say that Government is absolved from all liability, but all it can be held responsible for is for damages occasioned by the breach of its contract to remove the pucca bricks which it had undertaken to remove. But what would such a breach entail?

The contractor had a duty under section 73 of the Contract Act to minimise the loss, accordingly he would have had the right to remove the bricks himself and stack them elsewhere and claim compensation for the loss so occasioned ; and indeed two of his heads of claim (not in dispute here) relate to that. He has been awarded Rs. 11,744-11-0 under claim No. 4 for the extra lead in connection with the stacking of 1 crore 7 lacs of bricks due to the accumulation at the kiln site owing to the department's failure to work to its part of the time table, and in additions he has been given Rs. 15,500 under claim 13 for the cost of levelling and dressing land to enable him to stack these extra bricks.

Alternatively, he could have sold the bricks in the market and claimed the difference in price, but ordinarily he could not have claimed compensation for damage done to the katcha bricks unless he could have shown that that kind of damage, ordinarily too remote, was expressly contemplated by the parties when the contract was made : section 73 of the Contract Act. Here it is clear that this was in their express contemplation and they chose to provide against such a contingency by making clause 6 an express clause in their contract. There can therefore be no doubt that the arbitrator was wrong in his law. His construction of the terms of the contract was at fault. The question now arises whether his decision on this point is final despite it being wrong in law.

In India this question is governed section 16 (1) (*c*) of the Arbitration Act of 1940 which empowers a Court to remit an award for reconsideration

"where an objection to the legality of the award is apparent upon the face of it".

This covers cases in which an error of law appears on the face of the award. But in determining what such an error is, a distinction must be drawn between cases in which a question of law is specifically referred and those in which a decision on a question of law is incidentally material (however necessary) in order to decide the question actually referred. If a question of law is specifically referred and it is evident that the parties desire to have a decision from the arbitrator about that rather one from the Courts, then the Courts will not interfere, though even there, there is authority for the view that the Courts will interfere if it is apparent that the arbitrator has acted illegally in reaching his decision, that is to say, if he has decided on inadmissible evidence or on principles of construction that the law does not countenance or something of that nature. *See* the speech of Viscount Cave in *Kelantan Government* v. *Duff Development Co*,[1] at page 409. But that is not a matter which arises in this case.

The law about this is, in our opinion, the same in England as here and the principles that govern this class of case have been reviewed at length and set out with clarity by the House of Lords in *F. R. Absalom Ltd.* v. *Great Western (London) Garden Village Society*[2] and in *Kelantan Government* v. *Duff Development Co*[1]. In *Durga Prasad* v. *Sewkishendas*[3] the Privy Council applied the law expounded in *Absalom's case*[2] to India ; see also *Champsey Bhara & Co.* v. *Jivraj Ballo Spinning and Weaving Co.*[4] and *Saleh Mahomed Umer Dossel* v. *Nathoomal Kessamal*[5]. The wider language used by Lord Macnaghten in *Ghulam Jilani* v. *Muhammad Hassan*[6] had reference to the revisional powers of the High Court under the Civil Procedure Code and must be confined to the facts of that case where the question of law involved there, namely limitation, was specifically referred. An arbitrator is not a conciliator and cannot

1. L.R. (1923) A.C. 395.
2. L.R. (1933) A.C. 592.
3. (1949) 2 M.L.J. 760 : 54 C.W.N. 74, 79.
4. (1923) L.R. 50 I.A. 324, 330 & 331.
5. (1927) L.R. 54 I.A. 427, 430.
6. (1901) L.R. 29 I.A. 51, 60.

ignore the law or misapply it in order to do what he thinks is just and reasonable. He is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not, he can be set right by the Courts provided his error appears on the face of the award. The single exception to this is when the parties choose *specifically* to refer a question of law as a separate and distinct matter.

Reference was made to a decision of this Court in *A. M. Mair & Co.* v. *Gordhandass Sagarmull*[1] where Fazl Ali, J., quoted a passage from Viscount Simon's speech in *Heyman* v *Darwins Ltd.*[2] where the learned Lord Chancellor (Viscount Simon) in turn quoted from Lord Dunedin in another case. It was argued on the basis of this that if you have to have recourse to the contract to establish your case, then the dispute must fall within the arbitration clause. That is undeniable but it is not enough that the dispute should fall within the clause. It is also necessary that the parties should define what the dispute is and agree to refer the dispute so set out and defined to arbitration, or if they do not, that the Court should compel them to do so : (*see* Lord Macmillan in *Heyman's case*[3] just cited at pages 369 and 370). If, therefore, no specific question of law is referred, either by agreement or by compulsion, the decision of the arbitrator on that is not final however much it may be within his jurisdiction, and indeed essential, for him to decide the question incidentally. Lord Russell of Killowen and Lord Wright were both in the earlier case, *F. R. Absalom Ltd.* v. *Great Western (London) Garden Village Society*[4] as well as in *Heyman's case*[3] and they would have pointed to any distinction had there been a likelihood of conflict ; but in fact there is none and we do not read Fazl Ali, J's. Judgment as a decision to the contrary.

We have next to see whether the arbitrator was *specifically* asked to construe clause 6 of the contract or any part of the contract, or whether any question of law was *specifically referred*. We stress the word "specifically" because parties who make a reference to arbitration have the right to insist that the tribunal of their choice shall decide their dispute according to law, so before the right can be denied to them in any particulr matter, the Court must be very sure that *both* sides wanted the decision of the arbitrator on a point of law rather than that of the Courts and that they wanted his decision on that point to be final.

The clause in the contract that requires disputes about the contract to be referred to arbitration is clause 14 and is in the following terms :

"Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specification and instructions hereinbefore mentioned and as to quality of materials or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, specification, instructions, orders or these conditions, or otherwise concerning the supplies whether arising during the progress of delivery or after the completion or abandonment thereof shall be referred to the arbitration of the Superintending Engineer of the Circle for the time being in the manner provided by law relating to arbitration for the time being in force who after such investigation as he may think proper shall deliver his award which shall be final, conclusive and binding on all parties to the contract".

The dispute sprang out of a series of claims made in a number of letters written by the contractor to the Additional Chief Engineer, C.P.W.D. and culminated in a petition, Exhibit B. 1, in which the contractor summarised his claims. The document is not dated. On receipt of this, someone on behalf of the C.P.W.D. invoked the jurisdiction of the arbitrator. That letter has not been filed. The arbitrator then wrote to the contractor and asked him to submit a statement of claim. That letter has not been filed either but reference is made to it in Exhibit C. 1, a statement of claim which the contractor filed in response to that letter. As the material documents setting out the terms of reference are not here, we were asked by both sides to infer what the terms were from this statement of claim and the recitals in the award. The learned counsel for the contractor relied on the following :

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1. (1951) S.C.J. 1: (1950) S.C.R. 792 at 798.
2. L.R. (1942) A.C. 356 at 368.
3. L.R. (1933) A.C. 592.
4. L.R. (1942) A.C. 356 at 368.

In the statement of claim—

"*Item* 5.—Loss of katcha bricks....................Rs.75,900.

....

The chief reason of the destruction of these bricks was the failure of the department to lift the monthly quota of bricks........The argument of the department that they are not liable to compensate us on this account because of clause 6 of the agreement is not correct.

Clause 6 refers to only such cases over which the department has no control. But if the department would have lifted the bricks (this was entirely under their control) then no such loss would have occurred. Also be it noted that clause 6 refers only to 'damage' and not to 'destruction'........ Damage means only partial loss........it cannot mean total destruction".

The award states—

"The statement of claims *submitted by the contractor* contains seventeen items in respect of which the contractor claimed a total payment of Rs. 4,76,138-12-0 plus interest........*i.e.*, approximate total amount claimed : Rs. 5,03,803-12-0 as detailed below".

Then follow the seventeen items of which item 5 is—

"Payment for katcha bricks destroyed by rain : Rs. 75,900".

The body of the award deals with this as follows :—

Claim No. 5.

"Payment for 88 lacs of katcha bricks destroyed by rain.

The contractor argued, etc.................

The Executive Engineer stated..........The C.P.W.D. moreover were safeguarded by clause 6 of the contract......................

The contractor maintained that clause 6 of the contract could not be invoked when the department was at fault as in this case. Clause 6 was meant to cover contingencies which were not of the department's own making.

I hold that the removal of the bricks in such a manner or to prevent accumulation in excess of 60 lacs was an implied contractual obligation on the part of the C.P.W.D.........I further hold that the C.P.W.D. cannot take shelter behind clause 6 of the contract. This clause is not, in my opinion, meant to absolve the department from carrying out their part of the contract. It is impossible not to admit this without offending the rudiments of common-sense reasoning."

We are of opinion that this is not the kind of specific reference on a point of law that the law of arbitration requires. In the first place, what was shown to us is no reference at all. It is only an incidental matter introduced by the Dominion Government to repel the claim made by the contractor in general terms under claim No. 5. In the next place, this was the submission of the contractor alone. A reference requires the assent of *both* sides. If one side is not prepared to submit a given matter to arbitration when there is an agreement between them that it should be referred, then recourse must be had to the Court under section 20 of the Act and the recalcitrant party can then be compelled to submit the matter under sub-section (4). In the absence of either, agreement by *both* sides about the terms of reference, or an order of the Court under section 20 (4) compelling a reference, the arbitrator is not vested with the necessary exclusive jurisdiction. Therefore, when a question of a law is the point at issue, unless *both* sides *specifically* agree to refer it and agree to be bound by the arbitrator's decision, the jurisdiction of the Courts to set an arbitration right when the error is apparent on the face of the award is not ousted. The mere fact that both parties submit incidental arguments about a point of law in the course of the proceedings is not enough. The language of Lord Wright in *F. R. Absalom Ld.* v. *Great Western* (*London*) *Garden Village Society*[1], a case similar to this so far as this point is concerned, is apposite here—

"There is here no submission of any specific question of law as such and as a specific question of law ; no doubt incidentally, and indeed necessarily, the arbitrator will have to decide some questions on the construction of the building contract, but the two matters submitted are both composite questions of law and fact ; there is no express submission of the true effect of the contract on the basis of undisputed facts, as in the *Kelantan case*[2] or as a separate and distinct matter on facts to be separately assumed or found, as in In re *King and Duveen*[3]..........The arbitrator was not being asked simply and specifically to decide, upon some agreed or assumed basis of fact, the true interpretation of either

1. L.R. (1933) A.C. 592, 616.
2. L.R. (1923) A.C. 395.
3. L.R. (1913) 2 K.B. 32, 36.

clause 26 or clause 30 of the conditions or of both together ; he was being required to make an award on the two matters submitted on whatever questions of fact and law might emerge".

Clause 32 of the contract in the House of Lords case was the equivalent of clause 14 in ours. It ran—

"Provided always that in case any dispute or difference shall arise......as to the construction of the contract or as to any matter or thing arising thereunder......such dispute shall be and is hereby referred to the arbitration and final decision of, etc."

The arbitrator relied on that to invest him with jurisdiction to determine, as a matter of law, the construction of clauses 26-30 of that contract. The House of Lords held that in the absence of a *specific* reference about the construction of the contract the jurisdiction of the Courts was not taken away. Lord Russell of Killowen put it this way at page 610—

"No specific question of construction or of law was submitted. The parties had, however, been ordered to deliver pleadings, and by their statement of claim the contractor had claimed that the arbitrator should under his powers revise the last certificate issued, etc........It is at this point that the question of the construction of condition 30 arose as a question of law, *not specifically submitted*, but material in the decision of the matters which had been submitted. This question of law the arbitrator has decided ; but if upon the face of the award he has decided it wrongly his decision is, in my opinion, open to review by the Court".

That is exactly the position here. Simply because the matter was referred to incidentally in the pleadings and arguments in support of, or against, the general issue about liability for damages, that is not enough to clothe the arbitrator with exclusive jurisdiction on a point of law.

The next question is whether the error is apparent on the face of the award. That, in our opinion, is clear from the passages we have quoted from the award.

We hold that clause 6 expressly relieves the Union Government of all liability under this head of claim and that the arbitrator was wrong in awarding any sum on that account.

The next head in dispute is item No 8 in the statement of claim :

"Cost of additional wages paid to the coolies on account of non-supply of ration and cloth—Rs. 51,495".

Here again no specific question of law was referred, so all we have to see is whether there is an error of law apparent of the face of the award.

The contractor put his case as follows in the statement of claim :

"At the time when this work was allotted to us there was rationing system in the locality. As per conditions of contract we were bound not to employ local labour and we had to import coolies from far-off places. We had in our employ about 1800 coolies and it was an impossibility to arrange their ration from open market. This difficulty was brought to the notice of the *authorities concerned*, and they *promised us to supply ration*. It was only after this promise that we signed the agreement......From a perusal of these letters it is clear that *the department promised us to supply ration*........These *circumstantial evidences* are sufficient enough to show that there was a mutual *understanding* between the parties that ration will be supplied. In the eyes of law even circumstantial evidence is sufficient to prove that such a promise was made. Any breach of *that promise* makes the department legally liable to compensate for that loss......Apart from the legal responsibility it was also *a moral responsibility* for the department to supply ration."

This claim, therefore, was not grounded on any clause of the contract, nor was it said to be implied in the contract. What was relied on was a collateral promise evidenced, not by the contract, but by two letters written by "the department" and a promise by "the authorities concerned" ; and later this promise is turned into a "mutual understanding" and to a "moral responsibility" in addition to a legal one.

The arbitrator dealt with this as follows. He began by saying—

"The contractor stated that when he submitted his tender on 25-9-45 he did so in the *bona fide* belief that the department would make the necessary arrangements, etc."

Then he sets out the following dates. On 1st November, 1945, the contractor was told that his tender had been accepted. On 9th November, 1945, the contractor "warned" the Executive Engineer about his "immediate *requirements* in respect of rations". The contract was finally accepted and signed on 22nd November, 1945.

Now it is admitted that the contract contains no clause about rations and it is also evident that the question was not raised when the tender was accepted on behalf of the Dominion Government. The question was raised in a letter to the Executive Engineer, and the contractor signed the contrac *without waiting for a reply*.

It is well settled that governments can only be bound by contracts that are entered into in a particular way and which are signed by the proper authority. A reference to the agreement, Exhibit A. 1, will show that it was accepted on behalf of the Dominion Government by the Additional Chief Engineer and not by an Executive Engineer. A letter written to the Executive Engineer would therefore have no effect and even if it be assumed that the letter was forwarded to the Additional Chief Engineer for consideration, what does it amount to? A tender embodying certain terms is submitted and is accepted on 1st November, 1945. Both sides are agreed on all matters contained in it and their conduct shows that both sides indicated that the contract should be reduced to writing. Before the agreement is signed, one party wants to include a further condition in the contract. We will assume that the request was made to the other contracting party. But without waiting for the assent of the other side, both sides accept and sign the contract *as it existed before the fresh suggestion was made.* It is an error in law to deduce from this that there was acceptance of the fresh proposal. On the contrary, the legal conclusion is that the new suggestion was dropped and that the contractor was content to accept the contract as it was without this condition. In any case, a person cannot be bound by a one-sided offer which is never accepted particularly when the parties intend that the contract should be reduced to writing. That is the whole point of insisting on a document. It excludes speculation as to what was and what was not agreed to howeve much the matter might have been raised by one of the parties during the stage of negotiation.

The arbitrator continues that the *contractor* stated that—

> "It was a well known and established fact that Sindri was a rationed area ; that the C.P.W.D. were giving rations at controlled rates to their employees and contractors through arrangements with the local Civil Supply Authorities ; that nobody working under the C.P.W.D. was allowed to make independent arrangements or approach the Civil Supply Authorities direct"

and the *contractor* contended that the very fact that he tendered such low rates showed that *he expected* to supply his labourers with rations at controlled rates. The arbitrator then sets out some more of the *contractor's* contentions and from them concludes that

> "there was an implied contractual obligation for the C.P.W.D. to make available controlled rations to the contractor and that this obligation was not fulfilled with due diligence and care".

He accordingly awarded Rs. 40,000 as compensation under this head.

The error is apparent. Facts must be based either on evidence or on admission ; they cannot be found to exist from a mere contention by one side especially when they are expressly denied by the other. The inference from the facts stated above is that the contractor entered into the agreement with his eyes open and whatever his one-sided hopes may have been he was content to enter into the agreement as it stood without binding the other side to the new conditions and without even waiting to ascertain the reaction of the other side to his further proposals.

It has to be remembered that rationing was not a matter that was under the direction and control of the Dominion Government. It was a local matter handled by the then Provincial authorities and under their direction and control. The C.P.W.D., as a department of the Dominion Government, was not concerned with rationing except that its employees had to submit to rationing like everybody else in the Sindri area. This confusion between the Dominion Government and the Provincial Government occurs in the arbitrator's opening sentence under this head where he sets out the contractor's contention that

> "commodities such as rations and cloth which were absolutely essential for the maintenance of his labourers and *which were under Government control.*"

As the arbitrator bases solely on the contractor's contentions it is evident that he failed to appreciate the fact that the Dominion Government and the Provincial

rationing authorities were separate entities distinct from one another. The position accordingly reduces itself to this : two persons, neither of which is a part of the Provincial Government or has any control over rationing, chose to enter into an agreement for work in a rationed area. They insisted that their contract should be reduced to writing, and that indeed was essential this being a contract with the Dominion Government which was incapable of contracting in any other way ; they agreed upon and concluded all their terms ; then, at the last minute, one side raised a point about rationing but without waiting for a reply and without having the term entered in the contract, he signed the contract as it stood before the point was raised even during the negotiation. It is an error in law to hold that any contractual obligation can be inferred or implied from these circumstances.

Then there is still another error. If this implied agreement about rations and cloth does not spring out of the written contract but is to be inferred collaterally as a distinct and subsidiary contract, and we gather that that is the finding, especially as reference was made to section 9 of the Contract Act, then that is not a contract to which the arbitration clause can apply. Wide though it is, clause 14 is confined to any matter relating to the written contract and if ration and cloth are not covered by the written contract, they are not matters that relate to it. If parties choose to add a fresh contract in addition to or in substitution for the old, then the arbitration clause cannot cover the new contract. *See* Lord Macmillan in *Heyman* v. *Darwins, Ltd*[1].

The last item in dispute in this appeal is claim No. 17 about interest. The statement of claim sets out—

"Item 17—Interest on the amount of money involved in this claim at the rate of Rs. 6 per cent.—Rs. 27,665.

This work was finished in May, 1946 and it was proper for the department to have decided all our claims at least by 31st December, 1947......But this was not done. Due to this a heavy amount remained blocked up and we were compelled to take money from our bankers on interest. We therefore pray for interest for 16 months from 1-1-48 to 31-4-49".

The arbitrator held—

"The contractor's contention that his claims should have been settled by January, 1948, is, in my opinion, reasonable. I therefore award interest at 6 per cent. for 16 months on the total amount of the awards given, *i.e.*, Rs. 17,363".

Then the arbitrator sets out the amounts awarded under each head of claim. A perusal of them shows that each head relates to a claim for an unliquidated sum. The Interest Act, 1939, applies, as interest is not otherwise payable by law in this kind of case (See *Bengal Nagpur Ry. Co.* v. *Ruttanji Ramji*[2], but even if it be assumed that an arbitrator is a "Court" within the meaning of that Act, (a fact that by no means appears to be the case), the following among other conditions must be fulfilled before interest can be awarded under the Act :—

(1) there must be a debt or a sum certain ;

(2) it must be payable at a certain time or otherwise ;

(3) these debts or sums must be payable by virtue of some written contract at a certain time ;

(4) There must have been a demand in writing stating that interest will be demanded from the date of the demand.

Not one of these elements is present, so the arbitrator erred in law in thinking that he had the power to allow interest simply becuase he thought the demand was reasonable.

It was suggested that at least interest from the date of "suit" could be awarded on the analogy of section 34 of the Civil Procedure Code, 1908. But section 34 does not apply because an arbitrator is not a "Court" within the meaning of the Code

1. L.R. (1942) A.C. 356 at 371.
2. (1938) 1 M.L.J. 640 : (1937) L.R. 65 I.A. 66 : I.L.R. (1938) 2 Cal. 72 (P.C.).

nor does the Code apply to arbitrators, and, but for section 34, even a Court would not have the power to give interest after the suit. This was, therefore, also rightly struck out from the award.

We pause to note that there was only a delay of five days at the outside in the over-all picture. The last date for removal of the last instalment of bricks was 25th May, 1946 and the contractor says under this head that the whole contract was completed by the end of May, 1946. It is difficult to see how 88 lacs of bricks could have been damaged by rain in the last five days of May, and if the damage occurred before it would have occurred anyway, for on the contractor's case he had to have a large stock of unbaked bricks on hand ready to enter the kilns in order to keep pace with his time table. However, that was a matter within the jurisdiction of the arbitrator and is not a matter in which the Courts can interfere.

That concludes Civil Appeal No. 260 of 1953 and we now turn to the other appeal, Civil Appeal No. 12 of 1954. Only two items are in dispute here. Heads 4 and 17 of the claim.

The over-all pattern of the claim is the same as in the other case. There was a contractor and he entered into an agreement containing the same terms and conditions, except about the details of supply. It was signed on the same day as the other and by the same authority on behalf of the Dominion Government and the matter went before the same arbitrator and the award in this case was given on 1st May, 1949, one week before the other award. Here also, no specific question of law was referred and we need not cover the same ground. Our decision is the same here as there.

The fourth head of claim is about cloth and rations. The claim here, and the dominion Government's reply, is the same as in the other case, but the award in this case is not based on an implied contractual obligation but on "a moral and implied obligation". The error here is even greater than before. The sum claimed was Rs. 51,495 and the amount awarded was Rs. 30,000.

The seventeenth head of claim was about interest. The contractor claimed Rs. 27,665 and the arbitrator awarded Rs. 9,954. There is the same error of law apparent on the face of the award.

The High Court was right in dismissing the claims made under the heads in dispute here. The two appeals fail and each is dismissed with costs in this Court.

CIVIL APPEAL NO. 12 OF 1954.—*Bose, J.*—For the reasons given in our Judgment in Civil Appeal No. 260 of 1953 delivered to-day, this appeal is dismissed with costs in this Court.

Appeals dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—VIVIAN BOSE, B. JAGANNADHADAS AND B. P. SINHA, JJ.

N. Satyanathan .. *Appellant**

v.

K. Subramanyan and others .. *Respondents.*

Representation of the People Act (XLIII of 1951), section (7)(d)—Scope—Person with stage carriage permit having contract with Government to carry mails and postal articles on a particular route—Is disqualified to be chosen as member of either House of Parliament.

Section 7 of the Representation of the People Act is clearly intended to avoid a conflict between public duty and private interest. Where a person who holds a stage carriage permit enters into a contract with the Central Government for the transport of postal articles and mail bags (though in pursuance of Rule 160-B of the Madras Motor Vehicles Rules), he is disqualified under section 7 (*d*) of the Representation of the People Act, 1951, for being chosen as and for being a member of either House of Parliament. The Government in the Postal Department has only undertaken a service to be rendered to the community and such a service is not an essential function of a sovereign State.

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* Civil Appeal No. 252 of 1954. 29th March, 1955.

A bus permit-holder with a contract to carry mails on a route is directly concerned, for his own benefit in the contract entered into by him with the Government in the Postal Department.

Appeal by Special Leave from the Judgment and order dated the 22nd January, 1953, of the Election Tribunal, Vellore, in Election Petition No. 35 of 1952.

N. C. Chatterjee, Senior Advocate (*A. N. Sinha* and *N. H. Hingorani*, Advocates, with him), for Appellant.

C. V. L. Narayan, Advocate, for Respondent No. 1.

The Judgment of the Court was delivered by

Sinha, J.—The only question for determination in this appeal by special leave is whether the appellant is disqualified under section 7 (*d*) of the Representation of the People Act, 1951 (hereinafter called the Act) for election to the House of the People, as held by the Election Tribunal, North Arcot, Vellore, by its orders dated 20th January, 1953, in Election Petition No. 35 of 1952.

The facts of this case are not in dispute and lie within a narrow compass. The appellant and respondents 1 to 3 contested the last general election from the Dharmapuri Parliamentary Constitutency in the district of Salem in the State of Madras. Respondents 4 to 10 who were added subsequently by an order of the Tribunal were, also candidates for election. Their nominations also had been held to be valid but they ultimately withdrew their candidature before the polling took place. The appellant was in due course declared to have been elected to the House of the People. Thereafter, on the 5th March, 1952, the 1st respondent filed an election petition before the Election Commission contesting the appellant's election on the ground that the appellant was disqualified under section 7 (*d*) of the Act as, from the date of his nomination and until the date of election and after, the appellant had a contract with the Government of India in the Postal Department for the transport of postal mail which was a service undertaken by the Government of India. At this stage it is necessary to state that it is admitted that the appellant is and has been the holder of a stage carriage service permit (Exhibit B-2) dated the 26th April, 1949, issued by the Regional Transport Authority, Salem, Madras. It was one of the conditions of the said permit that if called upon the appellant will enter into an agreement with the Government of India for the transport of postal articles and mail bags. In pursuance of that obligation the appellant entered into a registered agreement with the Government of India on the 16th November, 1949 (Exhibit A-3) to be noticed in detail hereinafter. After the appellant had filed his nomination paper, the 1st respondent by his petition dated the 28th November, 1951 raised the objection to the effect that his nomination should be rejected on the ground that he had entered into a contract with the Government of India for his own benefit for the transport of mail between Salem and Yercaud. The Returning Officer for the Dharmapuri Parliamentary Constitutency, Salem, by his orders (Exhibit A-2) of the same date overruled the objection holding that the service rendered by the appellant of the carrying mail is not under an agreement but on an imperative order of the Government under Rule 160-B of the Madras Motor Vehicles Rules. Apparently the registered agreement (Exhibit A-3) had not been placed before him.

To the election petition filed by the 1st respondent the appellant filed his written statement on the 28th May, 1952, denying that he was disqualified for election as a member of Parliament by virtue of the provisions of section 7 (*d*) of the Act. His contention was that "it is the exclusive privilege of the Government of India to convey all postal articles from one place to another and it is a normal function of the Government statutorily reserved to itself. There is no justification to regard the carrying of mails from one place to another as the performance of any service *undertaken* by the Government". It was further averred on behalf of the appellant that it was not justifiable to regard him as having any interest in a contract for the performance of any service undert ken by the appropriate Government within the mischief of section 7 (*d*) of the Act; and that he had been only carrying out the obligations imposed upon him by Rule 160-B of the rules framed

under the Motor Vehicles Act. It was also contended that under Article 103 of the Constitution of India the question as to the disqualification of a member has to be decided by the President whose decision shall be final.

On those pleadings the following issues were framed by the Election Tribunal :—

1. Is the nomination of the 1st respondent invalid because of the prohibition contained in section 7 (*d*) of the Representation of the People Act, 1951, or for any of the reasons set forth in paras 9 to 11 of the petition?

2. Has this Tribunal no jurisdiction to decide the question as regards the disqualification of the returned candidate, because of Article 103 of the Constitution of India ?

It is not necessary to refer to the additional issue bearing on the question of limitation arising from an interlocutory application for impleading those candidates (respondents 4 to 10) whose nomination had been accepted but who had withdrawn from the contest. Both these issues were decided against the appellant. The Tribunal on a very elaborate discussion of the points raised before it, held that the postal service including the transport of mails is a service undertaken by the Central Government within the meaning of section 7 (*d*) ; that at the date of the nomination the appellant was a contractor under the Central Government; that the agreement between the Government and the appellant involved mutual obligations which could not be referable to a bare statutory duty on the part of the appellant but that it was the result of mutual assent based upon a free offer and acceptance; and that the agreement was supported by valid consideration. The Tribunal also held that Article 103 of the Constitution was not a bar to its jurisdiction to decide the controversy. Accordingly it allowed the election petition and held the appellant's election to be void in terms of section 100 (1) (c) of the Act, with costs to the respondent Hence this appeal.

In this appeal the contentions raised before the Election Tribunal except the objection to the Tribunal's jurisdiction in view of the provisions of Article 103 of the Constitution, have been pressed before us by the learned counsel for the appellant. It is manifest that the determination of this case must depend upon the true construction and legal effect of the agreement (Exhibit A-3) admittedly entered into by the appellant with the Central Government. It is therefore necessary to set out in some detail the relevant clauses of the agreement. The appellant (called the "contractor") is of the one part and the Governor-General of India of the other. The preamble says—

" Whereas the said contractor Sri N. Sathianathan has offered to contract with Governor-General or the provision of a Motor Vehicles Service for the transit conveyance and delivery of all postal articles and mail bags as defined in the Indian Post Office Act, 1898, as amended from time to time, ...from the 15th day of December, 1949 to the 14th day of December, 1952 and the Governor-General has accepted such offer upon the terms and conditions hereinafter appearing............

Now this indenture witnesseth that the contractor in pursuance of the said agreement and in consideration of the premises and of the payments hereinafter agreed to be made to him.........

It is hereby mutually agreed and declared between and by the parties hereto as follows :—

1. *Contract to carry.*—The contractor shall during the continuance of this contract, that is to say from the 15th day of December, 1949 until the 14th day of December, 1952 or until the said contract shall be determined by such notice as is hereinafter mentioned or otherwise in (hereinafter referred to as the said contract period) duly and safely convey............by means of motor vehicles of good and reliable manufacture all postal articles and mail bags................"

By clause 4 the contractor is permitted to carry passengers and their luggage by bus provided there is accommodation available and provided that the mail service is not prejudiced in any way. By clauses 5 and 6 the contractor is required to maintain in good order and repair a number of motor buses and their spare parts at his own expense and to bear all municipal and other taxes payable in respect of the motor vehicles. Clause 7 contains the schedule of penalities in the event of non-completion of any journey or of delay in completion thereof in accordance with the time table, etc. By clause 8 the contractor is made absolutely liable and responsible for the due and safe custody and delivery in good order and condition of postal articles and mail bags. By clause 10 non-gazetted postal and telegraph officers travelling on duty on the route allotted to the appellant are declared to be

entitled to travel free of all charges and such official passengers shall have precedence over ordinary passengers. Clause 13 provides that the contract shall not be transferred by the contractor to any person or company without the previous consent in writing of the Director-General of Posts and Telegraphs. By clause 15 the Government agrees to pay to the contractor Rs. 200 per month during the subsistence of the agreement "as his remuneration for service to be rendered by him hereunder". This monthly sum of Rs. 200 is liable to be increased or decreased proportionately to the increase or decrease in the mileage to be covered. Clause 18 is in these terms :—

" In the event of the contractor failing to secure a renewal of the permit on the line this contract will automatically terminate on the date up to which the old permit shall be valid and in such case no compensation shall be payable to either party for such termination. This contract may be absolutely determined and put an end to by either of the contracting parties giving four calendar months notice in writing to the other of his intention so to determine and put an end to the same ".

Clause 21 contains the usual arbitration clause to the effect that all disputes and differences arising out of or in any wise touching or concerning the agreement shall be referred to the sole arbitration of the Director-General of Posts and Telegraphs or his nominee. It is also provided that the award of the arbitrator shall be final and binidng on the parties.

It will be observed that the agreement set out above is a formally drawn up document which satisfies all the requirements of a contract. It is not the appellant's case that the contract has been vitiated by undue influence, fraud or such other cause. But it has been argued that it was a necessary sequel to the stage carriage permit granted by the Transport Authority under the Motor Vehicles Act read along with the relevant rules. In this connection reference was made to Rule 160-B of the Madras Motor Vehicles Rules which is as follows :—

" It shall be a condition of every stage carriage permit that the holder of the permit shall, if so required by the transport authority which granted the permit, carry mails at such rates and on such terms as the transport authority may fix after consultation with the holder of the permit and the postal authorities concerned ".

The rule quoted above has apparently been made under the authority of section 48 (*d*) of the Motor Vehicles Act. It is common ground that the agreement aforesaid between the appellant and the Central Government is in pursuance of Rule 160-B aforesaid ; but it has been argued on behalf of the appellant that though the agreement aforesaid has the "semblance of a contract", it is lacking in the "essential ingredients of a free consensus of acceptance and offer". This argument is based on the further contention that the appellant has been carrying mail on his buses in performance of a statutory obligation which cannot come within the mischief of section 7 (*d*) of the Representation of the People Act, 1951. The material portion of the section is in these terms :—

" A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament..............

(*b*) if, whether by himself or by any person or body of persons in trust for him or for his benefit or on his account, he has any share or interest in a contract for............the performance of any services undertaken by the appropriate Government ".

It has further been argued alternatively that if the agreement has the force of a contract, it is totally lacking in consideration because the monetary consideration provided for in the agreement is no more than the subsidy already fixed by the Regional Transport Officer by his orders dated the 23rd July 1949 ; that the agreement in question being with a third party, namely, the Governor-General, to render service which was already due to another party, namely, the Transport Authority for the same consideration cannot amount to a valid contract supported by consideration ; and finally, that the transport of mail is not a "service undertaken by the Central Government".

In our opinion there is no substance in any one of these contentions. It is true that the appellant entered into the contract aforesaid with the Central Government for the transport of postal articles and mail bags on the 16th November, 1949. From before that date he had been carrying on the business of plying buses on the

route allotted to him by the Regional Transport Authority. But he entered into the contract with his eyes open and knowing full well his rights and liabilities under the same. No one is compelled to carry on the business of stage carriage service or for the matter of that, of transporting postal articles and mail bags. In terms of the permit, it is open to the Government to call upon a permit-holder to undertake the additional burden of carrying postal articles and mail bags which carries with it the additional remuneration to be fixed by the Transport Authority after consultation with the postal authorities and the carrier. It is not every stage carriage permit holder who is called upon to do so. At the time the appellant entered into the contract with the Government in the postal department he may not have had any idea of standing for election to the House of the People when in future the general elections came to be held. If he wished to steer clear of the difficulty created by section 7 of the Act, he could have given due notice to Government under clause 18 of the contract referred to above. On the expiry of the term of the notice he would have been free to stand for election to a State or Central Legislature. Section 7 of the Act is clearly intended to avoid a conflict between public duty and private interest.

The Tribunal discussed a number of authorities with reference to the English and the American Law of Contract for arriving at the conclusion that the agreement between the appellant and the Government of India in the Postal Department had all the ingredients of a valid contract. The Tribunal need not have travelled so far afield, especially when the provisions of the Indian Contract Act which govern the case are sufficient to answer all the contentions raised on behalf of the appellant. On the face of the transaction the agreement was between two competent parties with their free consent. There was no question but that there was lawful consideration. The permit for the stage carriage had been granted by the authority under the Motor Vehicles Act; and the agreement for transport of postal articles and mail bags was between the Government of India in the Postal Department and the appellant for a cash consideration.

But it was argued that the agreement was in pursuance of a pre-existing obligation imposed by the rule aforesaid framed under the Motor Vehicles Act. It is true that the permit does contain a condition that the permit-holder may be called upon to undertake transport of mail bags and postal articles but that is only a notice to intending applicants for a stage carriage permit that the grantee of such a permit may have to render that additional service for an additional remuneration if called upon to do so by the authorities of the Postal Department. If any one was not prepared to undertake that additional responsibility, he was free not to make an application for such a permit; but that does not mean that the agreement actually entered into between the Postal Department and the permit-holder is not an independent contract governed by its own special terms. As indicated above, clause 18 has reserved the right to either party to terminate the contract on giving four months' notice. The appellant must be presumed to have known that the agreement that he had entered into with the Postal Department will stand in the way of his running as a candiate for election to the Central or the State Legislature. There was nothing to prevent him from giving the necessary notice to the depertment and thus terminate his agreement so as to be free to stand as a candiate for election to the Legislature. Section 7 of the Act is intended to ensure that there is no occasion for a conflict between public duty and private interests. The appellant had a clear and free choice before him. If he was anxious to serve the community as a member of the Central Legislature, he had to give up his private gains in the shape of the remuneration for carrying postal articles and mail bags in his buses. It may be that on his terminating the agreement with the postal department he would have to give up his stage carriage permit also but not necessarily so. If on the same route a number of bus services are permitted to different parties, the Postal Department may choose any one of them to enter into the agreement for the carriage of mail bags and postal articles. But even if there was only one service for the route in respect of which the appellant held the stage carriage permit, if he had to give up

his permit, some other party would take his place for running the bus service and carrying the postal articles and mail bags.

It was further argued that the appellant had no hand in the fixing of the remuneration to be paid by the Postal Department for carrying its mails, etc. But it is clear, by a reference to the terms of the rule quoted above, that the amount of the remuneration had to be fixed by the department after consultation with the carrier. It was always open to the latter to demur to the terms proposed by the department and if he found that the department was not prepared to accept his terms he was not bound to enter into the agreement. The fact that he had agreed to carry postal articles and mail bags was possibly an additional qualification for him to obtain a renewal of his permit and thus gave him an advantage over his competitors. Hence instead of being an additional burden or a handicap to him, it was an additional advantage to him in the matter of getting a renewal of his permit in preference to others. The agreement was therefore based on mutual promises, by the appellant to carry the mail bags, etc., and by the Postal Department to pay him suitable remuneration for the services thus rendered.

It was further contended on behalf of the appellant that the Central Government could not be said to have 'undertaken' any 'service' within the meaning of section 7 (*d*) of the Act when it made arrangements for the carriage of mail bags and postal articles through the appellant. It has not been and cannot be contended that the Government is bound in the discharge of its duties as a sovereign State to make provision for postal mail service. The provisions of the Indian Post Office Act, VI of 1898, are only enabling in the sense that they authorize the State agency to have the exclusive privilege of conveying letters, etc. for the convenience of the public and for the benefit of the Government, without making it obligatory upon it to provide every individual and every place with those facilities. It may be that those facilities are being extended from time to time and are being brought nearer to every home but that is only evidence of the fact that the State as a welfare state is anxious to provide for the conveniences of the public in the matter of communications and correspondence. That is to say, the Government in the Postal Department has only undertaken a service to be rendered to the community and that such a service is not an essential function of a sovereign State. It cannot be gainsaid that the Government in the Postal Department is rendering a very useful service and that the appellant has by his contract with the Government undertaken to render that kind of service on a specified route. The present case is a straightforward illustration of the kind of contract contemplated by section 7 (*d*) of the Act. At all material times the appellant had been directly concerned, for his own benefit, in the contract of carrying mail bags and postal articles entered into by him with the Government in the Postal Department.

For the reasons aforesaid we have not the least hesitation in holding that the conclusions arrived at by the Tribunal are entirely correct. The appeal is accordingly dismissed with costs.

G.R./K.S. ——— *Appeal dismissed.*

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—B. K. MUKHERJEA, *Chief Justice*, AND S. R. DAS, J.

Shiva Jute Baling, Ltd. .. *Petitioner**

v.

Hindley & Co., Ltd. .. *Respondent.*

Civil Procedure Code (V of 1908), *Order* 45, *rule* 8 *and Supreme Court Rules, Order* 13, *rule* 13—*Grant of special leave by Supreme Court under Article* 136 *of the Constitution of India* (1950)—*Effect—Appeal if "admitted"—Procedure.*

Ordinarily when a High Court grants a certificate giving leave to a party to appeal to the Supreme Court, it is the High Court which retains full control and jurisdiction over the subsequent proceedings

*Petition for Special Leave to Appeal No. 230 of 1953. 5th April, 1955.

relating to the prosecution of the appeal till the appeal is finally admitted. It is for the High Court to see that its directions are carried out regarding the furnishing of security or the making of deposit and when these conditions are fulfilled, it has then to declare the appeal finally admitted under Order 45, rule 8 of the Civil Procedure Code. The jurisdiction of the Supreme Court begins after the appeal is finally admitted. When however the appeal comes to the Supreme Court on the strength of a special leave granted by it, the position is different. In such cases, the order of the Supreme Court granting special leave by itself operates as an admission of the appeal as soon as the conditions in the order relating to furnishing of security or making of a deposit are complied with. It is to be noted that though Order 13, rule 9 of the Supreme Court Rules refer to the provisions of Order 45 of the Civil Procedure Code, these provisions are to be followed only so far as they are applicable. It is surely the duty of the High Court to see that security is furnished or a deposit is made in accordance with the directions of the Supreme Court and these directions are to be found in the order of the Supreme Court, which the Registrar is bound to transmit to the High Court under Order 13, rule 8 of the Supreme Court Rules. But it is not necessary for the appellants to file afresh a copy of the Supreme Court order or the petition upon which it was made in order that they may form part of the record of the Supreme Court appeal. They would come in the record as soon as they are transmitted by the Registrar in accordance with Order 13, rule 8 of the Supreme Court Rules and will have to be included in the paper book when it is printed. If there was any failure on the part of the appellant to furnish security or to make the deposit in the way indicated in the order of the Supreme Court, it would have been the duty of the Registrar of the High Court to intimate these facts to the Registrar of the Supreme Court and the latter thereupon could take steps for revoking the special eave as is contemplated in Order 13, rule 12 of the Supreme Court Rules. It is also not necessary for the appellants to make a formal application for admission of the appeal in cases where special leave has been granted by the Supreme Court. The Registrar of the High Court must issue notice of the admission of appeal by special leave to the respondents as soon as security for costs and other deposits of money were made by the appellants. Where this was not done though the appellants remained idle for a considerable period of time even after furnishing security in not taking any steps towards printing of the records, it cannot be held that the appellants are guilty of laches for which the special leave deserved to be rescinded.

In the matter of Petition for special leave to appeal No. 230 of 1953, Wherein Special Leave to appeal from the Judgment and Decree dated the 4th February, 1953 of the Calcutta High Court in Appeal from Original Decree No. 68 of 1952 was granted by this Court's order dated the 25th May, 1954 and in the matter of Application by the Respondent praying for initiation of action under rule 13 of Order 13, Supreme Court Rules.

Rajinder Narain, Advocate for Messrs. Hindley & Co., Ltd.

N. C. Chatterjee, Senior Advocate (*Sukumar Ghose*, Advocate, with him) for Messrs. Shiva Jute Baling, Ltd.

The Order of the Court was pronounced by—

Mukherjea, C. J.—This is an application by the respondents in Special Leave Petition No. 230 of 1953, praying for summons to the appellants to show cause why the special leave obtained by the latter should not be rescinded in accordance with the provision of Order 13, rule 13 of the Supreme Court Rules.

The appeal is directed against a judgment of a Division Bench of the Calcutta High Court affirming on appeal, a decision of a single Judge sitting on the Original Side of that Court. The Appellants, having been refused certificate by the High Court, presented before us an application under Article 136 of the Constitution and special leave to appeal was granted to them by an order of this Court dated the 25th May, 1954. By that order the appellants were required to furnish security for costs amounting to Rs. 2,500 within six weeks and the enforcement of the award, which was the subject-matter of the appeal was stayed on condition that the appellants deposited in Court a sum of Rs. 28,000 within four weeks from the date of the order. On the 15th of June, 1954, the Registrar of this Court transmitted to the Original sale of the Calcutta High Court certified copies of the order granting special leave and also of the special leave petition with a request that these documents might be included in the printed records of the case. It is not disputed that in pursuance of the directions given by this Court the appellants did deposit the amount required as security for costs and also the sum of Rs. 28,000 within the time mentioned in the order. On the 29th November, 1954, the respondents' Solicitors in Calcutta wrote a letter to the Registrar of the Original Side of the Calcutta High Court complaining of delay on the part of the appellants in prosecuting the appeal. It was stated *inter alia* that although six months had elapsed since spe-

cial leave was granted by this Court, the respondents were not served with notice of the admission of the appeal and no steps were taken by the appellants to get the records printed or transmitted to this Court. In reply to this letter the Registrar informed the respondents' Solicitors that according to the practice of the Calcutta High Court it was incumbent on the appellants to make a formal application to the Appellate Bench of the Court for declaring the appeal finally admitted, and this was to be done on notice to the other parties under Order 45, rule 8 of the Civil Procedure Code and on filing in Court a copy of the order of the Supreme Court granting special leave to appeal as well as the application upon which such order was made. Unless and until an order was made by the High Court declaring the appeal to be admitted, no action could be taken by the office in the matter.

Thereupon on the 11th of January, 1955, an application was filed by the appellants praying that leave might be given to them to file the certified copy of the special leave petition and also that of the order passed upon it and that the appeal might be finally admitted. This application came up for hearing before the learned Chief Justice and Lahiri, J. of the Calcutta High Court and on the 20th of January, 1955, the learned Judges made the following order :

> " In this matter special leave to appeal to the Supreme Court was granted by that Court on the 25th May, 1954. On the 21st June following, the Appellant furnished the necessary security. It was then the duty of the Appellant to take the necessary steps for the final admission of the appeal in order that the preparation of the Paper Book might thereafter be undertaken. Under the Rules and practice of this Court the step to be taken is that the Appellant to the Supreme Court should make an application for leave to file the certified copy of the petition for Special Leave and also a certified copy of the order granting Special Leave which have been filed along with the present application........................
>
> When the matter came up for hearing on the last occasion we enquired whether the Appellants had any explanation to give for the delay which had occurred. It was said that the certified copy of the application for Special Leave had been obtained only recently. It was however not explained why when an application for a certified copy of the order was made a similar application for a certified copy of the petition also could not be made.
>
> In all the circumstances we consider it right that the disposal of the present application should stand over for a month in order that the respondents may take such steps as they desire to take before the Supreme Court ".

The above facts and order of the High Court were communicated to the Registrar of this Court by Shri Rajinder Narain, Advocate for the respondents, by his letters dated the 17th and 31st of January, 1955 and on the basis of the facts stated above, he requested that action should be initiated by the Registrar against the appellants for non-prosecution of the appeal. The Registrar told the learned Advocate that he had not received any report from the High Court regarding any laches on the part of the appellants and without any such report, it was not possible for him to take any action in the matter. The Advocate himself, it was said, was quite at liberty to make a formal application to the Court in such way as he considered proper. The views thus expressed by the Registrar of this Court were communicated by him to the Registrar of the High Court, Original Side, Calcutta. On the 4th March, 1955, Shri Rajinder Narain filed a formal petition addressed to the Registrar alleging inordinate delay on the part of the appellants in filing in the High Court certified copies of the Special Leave petition and the order made by this Court thereupon and praying that summons might be issued to the appellants to show cause why the appeal should not be dismissed for non-prosecution. Before the Registrar could take any further steps in the matter, the application of the appellants for final admission of the appeal made in the High Court came up for further consideration before the Appellate Bench consisting of the Chief Justice and Mr. Justice Lahiri and on the 7th March, 1955, the learned Judges made an order directing, for the reasons given therein, adjournment of the application for admission of the appeal before them, *sine die* pending orders which this Court might pass on the application of the respondents. The application of the respondents which purports to have been made under Order 13, rule 13 of the Supreme Court Rules was referred by the Registrar for orders to the Court and it has now come up for hearing before us.

Shri Rajinder Narain appearing in support of the petition has contended before us that the appellants were guilty of serious laches inasmuch as they did not file

in the High Court, till 8 months after the special leave was granted, copies of the special leave petition as well as of the order passed upon it ; nor did they make an application to the Appellate Bench for admission of the appeal without which no further steps could be taken in the matter of printing and transmission of the record. As the appellants could not give any satisfactory explanation for this inordinate delay on their part, the special leave, it is argued, should be rescinded. Mr. Chatterjee, who appeared for the appellants, has contended on the other hand that in a case like the one before us where the appeal has come up to this Court by special leave and not by a certificate granted by the High Court, there was no duty cast upon the appellants to make a formal application in the High Court for final admission of the appeal or to file therein certified copies of the special leave petition and the order made thereupon. His argument is that under Order 32, rule 9 of the Original Side Rules of the Calcutta High Court, a Supreme Court appeal must be deemed to have been admitted by the very order of this Court granting special leave and as soon as the appellants have carried out the directions of the Supreme Court regarding furnishing of security or making of other deposits as the case may be, it is incumbent upon the Registrar to issue a notice of the admission of the appeal for service upon the respondents. Such notice indeed has got to be served by the appellants' attorney ; but as no notice was at all issued by the Registrar in the present case as is contemplated by rule 9 of Order 32 of the Original Side Rules of the Calcutta High Court, no blame could attach to the appellants for not taking further steps in the matter. The contention of Mr. Chatterjee appears to us to be well-founded and as it seems to us that doubts have arisen at times regarding the precise procedure to be followed in cases where an appeal comes to this Court by special leave granted under Article 136 of the Constitution, it is necessary to examine the provisions bearing upon it as are contained in the Rules of the Supreme Court or of the High Court concerned read along with the relevant provisions of the Civil Procedure Code.

Ordinarily when a High Court grants a certificate giving leave to a party to appeal to this Court, it is that Court which retains full control and jurisdiction over the subsequent proceedings relating to the prosecution of the appeal till the appeal is finally admitted. It is for the High Court to see that its directions are carried out regarding the furnishing of security or the making of deposit and when these conditions are fulfilled, it has then to declare the appeal finally admitted under Order 45, rule 8 of the Civil Procedure Code. The jurisdiction of the Supreme Court begins after the appeal is finally admitted. When however the appeal comes to this Court on the strength of a special leave granted by it, the position is different. In such cases the order of the Supreme Court granting special leave by itself operates as an admission of the appeal as soon as the conditions in the order relating to furnishing of security or making of a deposit are complied with. That this is the true position will be clear from the procedural provisions contained in the Rules of the Supreme Court as well as of the Original Side of the Calcutta High Court. Order 13, rule 8 of the Supreme Court Rules lays down :

> " After the grant of special leave to appeal by the Court, the Registrar shall transmit a certified copy of the order to the Court or tribunal appealed from ".

Rule 9 then says :

> " On receipt of the said order, the Court or tribunal appealed from shall, in the absence of any special directions in the order, act in accordance with the provisions contained in Order XLV of the Code, so far as applicable ".

It is to be noted here that although this rule does refer to the provisions of the Order 45 of the Civil Procedure Code, these provisions are to be followed only so far as they are applicable. It is surely the duty of the High Court to see that security is furnished or a deposit is made in accordance with the directions of the Supreme Court and these directions are to be found in the order of the Supreme Court which the Registrar is bound to transmit to the High Court under Order 13, rule 8 of our rules. We do not think it is necessary for the appellants to file afresh a copy of the Supreme Court order or the petition upon which it was made in order

that they may form part of the record of the Supreme Court appeal. They would come in the record as soon as they are transmitted by the Registrar in accordance with the rule of our Court mentioned above and would have to be included in the Paper Book when it is printed. The Registrar of the High Court undoubtedly took these orders as part of the record without the appellants' filing them afresh, for he accepted the security and deposit of other moneys from the appellants on the basis of these orders. If there was any failure on the part of the appellants to furnish the security or to make the deposit in the way indicated in the order of the Supreme Court, it would have been the duty of the Registrar of the High Court to intimate these facts to the Registrar of the Supreme Court and the latter thereupon could take steps for revoking the special leave as is contemplated by Order 13, rule 12 of our Rules In our opinion, it is also not necessary for the appellants to make a formal application for admission of the appeal in cases where special leave has been granted by the Supreme Court; and this appears clear from the provision of Order 32, rule 9 of the Original Side Rules of the Calcutta High Court which runs as follows :

"9. On the admission of an appeal to the Supreme Court whether by the order of this Court under Order 45, rule 8 of the Code, or by an order of the Supreme Court giving the appellant Special Leave to Appeal, but subject in the latter case to the carrying out of the directions of the Supreme Court as to the security and the deposit of the amount required by Rule 5, notice of such admission shall be issued by the Registrar for service on the respondent on the record, whether he shall have appeared on the hearing of the application for a certificate under Order 45, rule 3 of the Code, or not. Such notice shall be served by the attorney for the appellant and an affidavit of due service thereof shall be filed by such attorney immediately after such service".

The opening words of this rule plainly indicate that there could be admission of appeal either by the order of the High Court under Order 45, rule 8 of the Civil Procedure Code or by the order of the Supreme Court itself giving special leave to appeal. As the order granting special leave itself lays down the conditions to be fulfilled by the appellants, the admission will be regarded as final only when the directions are complied with and as soon as this is done it would be the duty of the Registrar to issue a notice of the admission of the appeal for service upon the respondents. This notice is to be served by the attorney for the appellants and an affidavit of due service shall be filed by him immediately after the service is effected.

In the present case the Registrar, Original Side of the Calcutta High Court should have issued a notice of the admission of the appeal to be served upon the respondents as soon as the security for costs and other deposits of money were made by the appellants. This was not done as the procedure to be followed was not correctly appreciated. It is true that the appellants remained idle for a considerable period of time even after they furnished security and did not take any steps towards printing of the record. But as there was an initial irregularity in the matter of issuing a notice under Order 32, rule 9 of the Original Side Rules of the Calcutta High Court, we are unable to hold that the appellants were guilty of any laches for which the special leave deserves to be rescinded. The result is that the application of the respondents is dismissed. The Registrar, Original Side of the Calcutta High Court, will now issue a notice under Order 32, rule 9 of the Original Side Rules and prompt steps should be taken by the appellants, towards printing and transmission of the record to this Court. We make no order as to costs of this application.

G.R./K.S. *Application dismissed.*

SUPREME COURT OF INDIA

(Original Jurisdiction).

PRESENT.—BIJAN KUMAR MUKHERJEA, *Chief Justice*, S. R. DAS, VIVIAN BOSE, B. P. SINHA AND SYED JAFER IMAM, JJ.

Rao Shiva Bahadur Singh .. *Petitioner**

v.

The State of Vindhya Pradesh and another .. *Respondents.*

Constitution of India (1950), *Article* 145 (3)—*Scope—Case involving substantial question of law as to the interpretation of the Constitution—Whole case if to be decided by the Constitution Bench—Directing the case after deciding constitutional questions to be posted for disposal on merits by a Division Bench—Validity.*

By the majority (*Mukherjea, C. J., S. R. Das, Vivian Bose and S. J. Imam, JJ.*):—The splitting up of cases into different stages for hearing and decision is not repugnant to the Constitution or the general principles of procedural law. The underlying principle of the Constitution is clear and all that it insists upon is that all constitutional questions should be heard and decided by a Bench of not less than five Judges. As long as this requirement is fulfilled there can be no constitutional objection to the rest of the case being disposed of by a Division Bench of less than five Judges, so as to save the time of the Constitution Bench of five or more judges. There is nothing in principle which requires that a case must always be decided in its entirety by one Judge or one set of Judges even though such a case may conveniently be dealt with in two or more stages. If a Court is entitled to decide a case in stages there is no reason why Article 145(3) should be so construed as to deprive the Supreme Court of that inherent power. It will involve no violation of any principle of natural justice or of any legal principle if clause (3) of Article 145 is construed as requiring only that the minimum number of five Judges must sit for the purpose of deciding any case in so for and as long as it involves a substantial question of law as to the interpretation of this Constitution. Indeed, it is on this interpretation that the practice has grown up in the Supreme Court for a Constitution Bench to dispose of all constitutional questions and to leave the other subsidiary questions for disposal by a Division Bench of less than five Jugdes in conformity with the opinion of the Constitution Bench.

Per *Sinha, J.*—The Constitution while laying down clause (3) of Article 145 contemplates the whole matter in controversy arising in a case which may include substantial questions of law as to the interpretation of the Constitution as also other questions. The main clause (3), excepting cases coming within the purview of the proviso does not contemplate a splitting up of a case into parts, one part involving substantial questions of law as to the interpretation of the Constitution and another part or parts not involving such questions,

Petition under Article 32 of the Constitution for a Writ of *Habeas Corpus.*

Purshottam Trikumdas, Senior Advocate (*K. B. Asthana, Syed Murtaza Fazl Ali* and *Rajinder Narain*, Advocates with him) for the Petitioner.

M.C. Setalvad, Attorney-General for India and *C. K. Daphtary*, Solicitor-General for India (*Porus A. Mehta* and *R. H. Dhebar*, Advocates, with them) for Respondents.

The Judgment of the Majority (Mukherjea, C.J., S. R. Das, Vivian Bose and S.J. Imam, JJ.) was delivered by

Das, J.—This is a petition for a writ in the nature of a writ of *habeas corpus* calling upon the respondents to show cause why the petitioner, who is now confined in the Central Jail at Rewa, should not be set at liberty. The petitioner's grievance is that he has been deprived of his liberty otherwise than in accordance with procedure established by law. A rule *nisi* having been issued, the respondents have filed an affidavit by way of return to the writ. The question for our decision is whether the return is good and sufficient in law.

The facts leading up to the present petition are few and simple. In the years 1948 and 1949 the petitioner was the Minister of Industries in the Government of Vindhya Pradesh which was at that time an Acceding State within the meaning of section 6 of the Government of India Act, 1935, as amended in 1947. On the 11th April, 1949, the petitioner was arrested in Delhi on the allegation that he had accepted illegal gratification in order to show favour to Panna Diamond Mining Syndicate in the matter of the lease of the Diamond Mines at Panna. In December, 1949, the petitioner along with one Mohan Lal, who was the then Secretary in the Ministry of Industries, was put up for trial before the Court of Special Judge, Rewa;

* Petition No. 40 of 1955 7th April, 1955.

constituted under the Vindhya Pradesh Criminal Law Amendments (Special Courts) Ordinance No. V of 1949. The charges were under sections 120-B, 161, 465 and 466 of the Indian Penal Code as adapted for Vindhya Pradesh by the Indian Penal Code (Application to Vindhya Pradesh) Ordinance No. XLVIII of 1949. By his judgment pronounced on the 26th July, 1950, the Special Judge acquitted both the accused. The State preferred an appeal against that acquittal to the Judicial Commissioner of Vindhya Pradesh. By his judgment pronounced on the 10th March, 1951, the Judicial Commissioner reversed the order of acquittal, convicted both the accused and sentenced them to different terms of rigorous imprisonment under the different sections in addition to the payment of certain fines. On the application of the petitioner and his co-accused, the Judicial Commissioner on the 12th March, 1951, issued a certificate to the effect that four points of law raised in the case and formulated by him in his order were fit for the consideration of this Court in appeal under Article 134 of the Constitution of India. A petition of appeal was filed in this Court on the strength of this certificate of fitness and it was registered as Criminal Appeal No. 7 of 1951.

As the case involved a substantial question of law as to the interpretation of the Constitution, it was, in April 1953, placed before a Bench of five Judges of this Court as required by Article 145 (3) of the Constitution. For convenience of reference we shall call a Bench of five or more Judges as the Constitution Bench. The validity of the convictions and sentences was challenged before the Constitution Bench on the ground that there had been infringements of Articles 14 and 20 of the Constitution. A further point of law was raised that no appeal lay to the Judicial Commissioner from the acquittal by the Special Judge. By their judgments pronounced on the 22nd May, 1953, the Constitution Bench rejected all these objections. The judgment concluded with the following direction :

> "The appeal is accordingly directed to be posted for consideration whether it is to be heard on merits".

This was evidently done in view of the fact that the certificate of fitness granted by the Judicial Commissioner was limited only to four points of law.

The constitutional points having been disposed of, the appeal was placed before a Division Bench of three Judges who on the 20th October, 1953, ordered the appeal to be heard on the merits. The appeal was accordingly put up for hearing before another Division Bench consisting of three Judges. On the 5th March, 1954, this Division Bench allowed the appeal of Mohan Lal and acquitted him but dismissed the appeal of the petitioner with respect to his conviction under sections 161, 465 and 466, Indian Penal Code, as adapted in Vindhya Pradesh, but set aside his conviction on the charge under section 120-B. The sentence of three years' rigorous imprisonment was maintained but the sentence of fine was set aside.

On the 18th March, 1954, a petition for review was filed on behalf of the petitioner. It was directed against the judgment of the Constitution Bench pronounced on the 22nd May, 1953, repelling the constitutional points as well as against the judgment of the Division Bench dated, 5th March, 1954, dismissing the petitioner's appeal on the merits. On objection being taken by the Registry against one application being filed for the review of two judgments one of which had been pronounced much earlier than the period allowed for filing a review application, the petitioner filed a second application for review of the judgment of the Constitution Bench and prayed for condonation of the delay in filing the same. On the 5th April, 1954, the application for review was put up for hearing before the same Division Bench which had pronounced the judgment on the merits dated the 5th March, 1954. After considering the points of review relating to that judgment, the Division Bench on the same day came to the conclusion that no ground had been made out for review of that judgment and accordingly dismissed the petition. An order was drawn up as of that date directing the petitioner who had been previously enlarged on bail to surrender and serve out his sentence.

On the 12th April, 1954, another petition was filed on behalf of the petitioner praying that the review matter relating to the judgment of the Constitution Bench

delivered on the 22nd May, 1953, be placed before a Constitution Bench for final disposal. That review application was put up before a Constitution Bench which on the 17th May, 1954, declined to entertain the same.

In the meantime the petitioner had in the last week of April 1954 surrendered and has since then been confined in the Central Jail at Rewa. The present application has, therefore, been made for a writ of *habeas corpus* on the allegation that the petitioner has been and is being deprived of his liberty otherwise than in accordance with procedure established by law.

In the present petition the petitioner has again urged that the Court of the Judicial Commissioner of Vindhya Pradesh was not the proper forum for entertaining the appeal against the judgment of the Special Judge and consequently the judgment of the Judicial Commissioner setting aside the acquittal of the petitioner and convicting and imposing sentence of imprisonment was void and inoperative. Alternatively, it has been urged that, assuming that the Judicial Commissioner had jurisdiction to hear the appeal from the Special Judge and his judgment was in accordance with procedure established by law, the appeal filed by the petitioner in this Court against the judgment of the Judicial Commissioner should have been, under Article 145 (3) of the Constitution, heard and completely disposed of by the Constitution Bench. As regards the first point as to the incompetency of the Court of the Judicial Commissioner to entertain the appeal from the decision of the Special Judge the same has been fully dealt with by the Constitution Bench and cannot be reagitated. Indeed, learned counsel appearing in support of this petition has not pressed the same. The only point urged before us is the alternative plea mentioned above which depends for its decision on a true construction of Article 145.

Article 145 by clause (1) authorises this Court, subject to the provisions of any law made by Parliament and with the approval of the President, to make rules for regulating generally the practice and procedure of the Court, including, amongst others, rules as to the procedure for hearing appeals as to the entertainment of appeals under sub-clause (*c*) of clause (1) of Article 134 and as to the conditions subject to which any judgment pronounced or order made by the Court may be reviewed and the procedure for such review. Clauses (2) and (3) of the Article are in the terms following :—

> " (2) Subject to the provisions of clause (3), rules made under this article may fix the minimum number of Judges who are to sit for any purpose, and may provide for the powers of single Judges and Division Courts.
>
> (3) The minimum number of Judges who are to sit for the purpose of deciding any case involving a substantial question of law as to the interpretation of this Constitution or for the purpose of hearing any reference under Article 143 shall be five :
>
> Provided that, where the Court hearing an appeal under any of the provisions of this Chapter other than Article 132 consists of less than five Judges and in the course of the hearing of the appeal the Court is satisfied that the appeal involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the appeal, such Court shall refer the question for opinion to a Court constituted as required by this clause for the purpose of deciding any case involving such a question and shall on receipt of the opinion dispose of the appeal in conformity with such opinion ".

The contention of the petitioner is that the question whether a particular case involves a substantial question of law as to the interpretation of the Constitution is to be examined at the time when the case first comes before this Court. If at that stage it is found that it is a case involving a substantial question of law as to the interpretation of the Constitution it becomes irrevocably impressed with that character and quality and the minimum number of judges who are to sit for the purpose of deciding such case must be a Constitution Bench, that is to say, a Bench of at least five Judges. The argument then proceeds to say that once the Constitution Bench takes seisin of the case and starts the hearing that Bench and that Bench alone must decide the whole of such case, that is to say, decide all questions, constitutional or otherwise, arising in the case. Sri Purshottam Trikumdas who appears in support of this petition has strongly relied on the language used

in clause (3) and contends that "the case" cannot be split up and that the clause requires the entire case to be disposed of by the Constitution Bench. He, therefore, urges that the Division Bench had no jurisdiction to take up the case involving substantial questions of law as to the interpretation of the Constitution and consequently the judgment of that Division Bench pronounced on the 5th March, 1954 was illegal and void. According to him, his client's appeal, in the eye of the law, remains undisposed of and as he had been let out on bail until the disposal of his appeal, his detention in jail pursuant to the judgment of the Division Bench, which is a nullity, amounts to deprivation of his personal liberty otherwise than in accordance with procedure established by law and is an infringement of his fundamental right under Article 21 of the Constitution. The argument at first sight certainly appears to be plausible but on a deeper consideration of the constitutional provisions bearing on the subject and the general principles regulating the procedural powers of Courts we are unable to accept the same as sound or well founded.

In this very case the Judicial Commissioner of Vindhya Pradesh had granted a certificate of fitness under Article 134 (1) (*c*). Consequently under the proviso to clause (3) of Article 145 the appeal might well have been placed before a Division Bench consisting of less than five Judges. In that situation, being satisfied that the appeal involved a substantial question of law as to the interpretation of the Constitution the determination of which was necessary for the disposal of the appeal, that Division Bench could refer the question for the opinion of a Constitution Bench and on receipt of the opinion dispose of the appeal in conformity with such opinion; but to accede to the argument of Sri Purshottam Trikumdas will lead us to hold that while a Division Bench of three Judges could split up this very case, had it been posted before it in the first instance, by referring the constitutional questions to a Constitution Bench for its opinion and then, after receipt of that opinion, disposing of the rest of the case on merits in conformity with such opinion, a Constitution Bench of five or more Judges before which the case happened to be posted in the first instance could not split up the case by deciding the constitutional questions and leaving the rest of the case to be dealt with and disposed of by a Division Bench of less than five Judges on merits in conformity with the opinion of the Constitution Bench thus saving the time of the Constitution Bench. Reference may also be made to Article 228 which authorises the High Court, if satisfied that a case pending in a Court subordinate to it involves a substantial question of law as to the interpretation of the Constitution the determination of which is necessary for the disposal of the case, to withdraw the case and either to dispose of the case itself or determine the said question of law and return the case to the Court from which it has been so withdrawn so as to enable the said Court to proceed to dispose of the case in conformity with the judgment of the High Court. Here again learned counsel's argument leads us to hold that while the High Court can split up a case involving a substantial question of law as to the interpretation of the Constitution a Constitution Bench of this Court cannot do so. Apart from these provisions of the Constitution there are provisions made by procedural statutes which result in a case being partly heard by one Judge and partly by another Judge. To cite only a few instances, reference may be made to section 24 and Order 18, rule 15 of the Code of Civil Procedure and sections 350, 526, 528 and 556 of the Code of Criminal Procedure. The argument of Sri Purshottam Trikumdas, pushed to its logical conclusion, must amount to this that although Courts operating under the ordinary procedural codes may split up cases into different stages for the purpose of hearing and decision, a Constitution Bench of this Court cannot do so if a case involving substantial questions of law as to the interpretation of the Constitution happens to be posted befor it in the first instance.

Learned counsel for the petitioner recognises the incongruity that results from his argument but contends that it cannot be helped because the relevant provisions referred to above expressly sanction the spliting up of cases whereas the body of clause (3) of Article 145 does not. His argument is that in the cases

mentioned above splitting up of cases has to be allowed because the special provisions of the Constitution or other statutes provide for such splitting up in those cases. He contends that the very fact that these provisions had to be made clearly indicates that but for them there could not have been any splitting up of the case. It is said that these provisions are exceptions to the general rule of indivisibility of a case. We are unable to accept this reasoning as correct.

In the first place the proviso to Article 145 (3), Article 228 and the other provisions of the Codes referred to above quite clearly indicate that the splitting up of cases into different stages for hearing and decision is not repugnant to the Constitution or the general principles of procedural law. The underlying principle of the Constitution is clear and all that it insists upon is that all constitutional questions should be heard and decided by a Bench of not less than five Judges. As long as this requirement is fulfilled there can be no constitutional objection to the rest of the case being disposed of by a Division Bench of less than five Judges, so as to save the time of the Constitution Bench of five or more Judges.

In the next place we are not aware of any such general rule of indivisibility as is being insisted upon by learned counsel. There is nothing in principle which requires that a case must always be decided in its entirety by one Judge or one set of Judges even though such a case may conveniently be dealt with in two or more stages. Indeed, in *Maulvi Muhammad Abdul Majid* v. *Muhammad Abdul Aziz*[1], the Privy Council pointed out that where a Judge had before him a case consisting of two parts, a question of title and an incidental question of account depending on title, it did not require any provision of the Civil Procedure Code to authorise him to decide the first question and reserve the second for further investigation and that to treat such a proceeding as beyond the power of the Court and as an error which barred the proceedings reserved for further decision was a serious miscarriage of justice. Indeed, the Court often exercises its inherent power, if it thinks fit to do so, to decide questions of jurisdiction or limitation or the like as preliminary questions reserving other questions of fact for future investigation. The decision of a case at two or more stages may and often does result in the case not being decided by the same Judge, for the Judge who decided at the first stage may, by reason of death, retirement or transfer, be not available for deciding the case at the later stages. It follows, therefore, that no argument can be founded on any supposed general rule of indivisibility of a case for the purpose of its hearing and decision.

The consideration that there is no such general rule as is relied on by learned counsel and that the splitting up of cases is not generally repugnant to law and in particular to the Constitution, leads us to the conclusion that in construing clause (3) of Article 145 no quality of indivisibility need be attributed to the words " the case " used therein. A case may, to begin with , involve a substantial question of law as to the interpretation of the Constitution, but it may cease to do so at a later stage. Suppose a case which involves a constitutional question is placed before a Constitution Bench but learned counsel appearing in support of the case intimates to the Bench that he does not press any constitutional point, surely he cannot, in that situation, insist that the time of a Bench of five or more Judges should be spent on the determination of a case which, by his own election, has ceased to involve any constitutional question. Likewise, when the constitutional questions involved in the case are disposed of by a Constitution Bench what remains of the case cannot properly or appropriately be described as still a " case involving a substantial question of law as to the interpretation of this Constitution ". It should be borne in mind that when a case or appeal is properly admitted to this Court all that the parties are entitled to is a decision of this Court and not of any particular Bench. So long as the minimum number of Judges which the Constitution and the rules framed by this Court prescribe are present to hear and decide the questions raised from stage to stage, they represent the Court for the purpose of giving decisions on its behalf and the parties get all that they are entitled to under the law. If a Court

1. (1896) L.R. 24 I.A. 22 : I.L.R. 19 A. 155 (P.C.).

is entitled to decide a case in stages, as the Privy Council has held it can, there is no reason why Article 145 (3) should be so construed as to deprive this Court of that inherent power. It will involve no violation of any principle of natural justice or of any legal principle if we construe clause (3) of Article 145 as requiring only that the minimum number of five Judges must sit for the purpose of deciding any case in so far and as long as it involves a substantial question of law as to the interpretation of this Constitution. We find nothing in the language of clause (3) of Article 145 which militates against this interpretation of that clause. Indeed, it is on this interpretation that the practice has grown up in this Court for a Constitution Bench to dispose of all constitutional questions and to leave the other subsidiary questions for disposal by a Division Bench of less than five Judges in conformity with the opinion of the Constitution Bench. There is nothing that we find in the body of clause (3) of Article 145 which compels us to depart from the famous maxim *cursus curiae est lex curiae* which was laid down by Lord Coke in *Burrowes* v. *High Commission Court*[1], and which was quoted with approval in *Habibar Rahman* v. *Saidannessa Bibi*[2].

For reasons stated above we consider that a good and valid return has been made by the respondents to the rule *nisi* issued to them and this application must be dismissed. We order accordingly.

Sinha, J.—I regret to have to differ from my learned brethren on the construction of Article 145 (3) of the Constitution which is the main question in controversy in this case. Clause (3) of Article 145 is in these terms :—

> " The minimum number of Judges who are to sit for the purpose of deciding any case involving a substantial question of law as to the interpretation of this Constitution or for the purpose of hearing any reference under Article 143 shall be five :
>
> Provided that, where the Court hearing an appeal under any of the provisions of this Chapter other than Article 132 consists of less than five Judges and in the course of the hearing of the appeal the Court is satisfied that the appeal involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the appeal, such Court shall refer the question for opinion to a Court constituted as required by this clause for the purpose of deciding any case involving such a question and shall on receipt of the opinion dispose of the appeal in conformity with such opinion."

It is noteworthy that the Constitution has not vested this Court with complete power to make rules as to the constitution of Benches for hearing matters coming before this Court in its Original, Appellate or Advisory Jurisdiction. Clause (2) of Article 145 has invested this Court with power to make rules fixing the minimum number of Judges who are to sit for any purpose and for defining the powers of single Judges and Division Courts. But this power is expressly made subject to the limitation laid down in clause (3) quoted above ; that is to say, where any case involves a substantial question of law as to the interpretation of the Constitution (omitting the words not material for our present purpose) the minimum number of Judges prescribed by the Constitution to decide such a case is five. A case may involve questions of law as to the interpretation of the Constitution, as also other questions. In this case we have to determine whether clause (3) contemplates the whole case or a part of a case. In my opinion, the Constitution while laying down clause (3) of Article 145 contemplates the whole matter in controversy arising in a case which may include substantial questions of law as to the interpretation of the Constitution as also other questions. The main clause (3), excepting cases coming within the purview of the proviso does not contemplate a splitting up of a case into parts, one part involving substantial questions of law as to the interpretation of the Constitution and another parts or parts not involving such questions. My reasons for coming to this conclusion are as follows :

Clause (3) itself read along with the proviso makes a distinction between a " case " and a " question " of the nature indicated in the proviso to the clause. The Constitution has clearly indicated that cases coming within the purview of the proviso may be split up so as to admit of the questions of constitutional im-

1. 3 Bulst. 48 at p. 53 : 81 E.R. 42. 2. (1923) I.L.R. 51 Cal. 331 at p. 335.

portance being determined by a Bench of at least five Judges who may be described for the sake of convenience as a "Constitution Bench" in contradistinction to a Division Court consisting of less than five Judges, as is contemplated in the proviso. The main clause (3) requires a case of the description therein set out to be heard and decided by a Constitution Bench, whereas the proviso contemplates that only the question of constitutional importance (using a compendious phrase) has to be decided by a Constitution Bench and the case out of which such a question arises remaining in the seisin of the Division Court before which the case was originally placed for hearing.

The Constitution has placed cases involving substantial questions of law of constitutional importance on a special footing. If the framers of the Constitution had intended that not the whole case but only particular questions of the nature indicated had to be heard by a minimum number of five Judges, they would have used words similar to those used in the proviso making it permissible for the Constitution Bench to give its opinion for the decision of the case by a Division Court in conformity with that opinion.

A reference to the terms of Article 228 of the Constitution would also show that the framers of the Constitution were fully alive to the difference between the decision of the "case itself" and a "question of law" of constitutional importance involved in that case. It has made clear in that article that the High Court shall either decide the whole case including the question of law as to the interpretation of the Constitution which was necessary for the disposal of the case or determine only such a question or questions and return the case to the original Court for disposal in conformity with the judgment of the High Court on such question or questions. The Constitution made these specific provisions to emphasize that there is a distinction between determining the case itself and determining a substantial question of law of constitutional importance.

Can it be said that if clause (3) of Article 145 had been enacted without the proviso, a case could be heard piecemeal first by a Constitution Bench which would determine only questions of law as to the interpretation of the Constitution, and then the residue of the case being heard and determined by a Division Court? That, in my opinion, would not be in compliance with the imperative provisions of the main clause (3). The framers of the Constitution therefore enacted the proviso in the nature of an exception to the general rule laid down in the main clause (3). It has to be observed that the proviso is limited to appeals only, subject to the further exception that such appeals should not have come up to this Court through the process laid down in Article 132 of the Constitution. It is thus clear that not all cases contemplated in the main clause (3) but only appeals of a particular description would come within the qualifying provisions of the proviso.

The word "case" has not been defined but it may be taken as settled law that it is much wider than a "suit" or an "appeal". Hence whereas the proviso would apply to appeals brought up to this Court, except those under Article 132 of the Constitution, the main clause (3) would apply to all appeals and all other matters coming up to this Court in its Original, Appellate and Advisory Jurisdictions. In my opinion, there cannot be the least doubt that the main provisions of clause (3) are all-embracing, and contemplate all cases coming up to this Court.

It has not been contended that the present case comes within the purview of the proviso but it has been said that if it is open to a Division Court to refer a question of constitutional importance to a Constitution Bench, why should not a Constitution Bench be competent to refer questions other than those of constitutional importance to a Division Court? The answer is that whereas the former is contemplated by the Constitution in terms, the latter is not. Nor are there any rules to that effect.

But it has been further observed that the splitting up of a case into parts, one involving questions of constitutional importance and the remaining part not involving questions of that kind, is not against the provisions of the Constitution. But, in my opinion, if the Constitution has made a specific provision as to the splitting up of a case into parts, one cognisable by a Court of higher jurisdiction like a Constitution Bench and the rest by a Court of lower jurisdiction like a Division Court, the argument is not available that a splitting up of a case apart from those specific provisions is also permissible. In this connection reference was made to certain provisions of the Code of Civil Procedure as also of the Code of Criminal Procedure to show that those Codes do contemplate hearing of the same case in part by different Courts, but those are all Courts of co-ordinate jurisdiction in which the question of the power of the Court itself relatively to the subject-matter of the case is not in question. The Court which originally dealt with the case and the Court which finally came to hear and determine the matter were each one of them competent to deal with the whole matter or any part of it. That is not the position here. In this case the argument on behalf of the petitioner is that as admittedly his appeal involved substantial questions of law as to the interpretation of the Constitution and as it did not come within the purview of the proviso to clause (3) of Article 145 of the Constitution, it should have been dealt with throughout by a Constitution Bench. It was suggested in answer to this argument that after the questions of law of constitutional importance had been dealt with by the Constitution Bench the case ceased to be one involving such questions and therefore could have been heard by a Division Court. But the difficulty in accepting this argument is that once a Constitution Bench was seized of the case, it could not transfer it to another Bench for sharing the decision of that case with it. That Bench should have heard out the whole case and it had not the power to direct, and it did not so direct, that the remaining part of the case should be heard by a Division Court. Once a Constitution Bench is seized of the case, it has to hear the case to its conclusion. There was no process known to the rules framed under the rule-making power of this Court by which a case once it came before a Constitution Bench could get transferred from that Bench to a Division Court either automatically or by orders of any authority. But it has been suggested that it may happen that a Constitution Bench may start the hearing of the case, and before the hearing is concluded one of the Judges is by reason of death or otherwise disabled from hearing out the case and in that event the Chief Justice has the power to constitute another Bench. But that is quite a different matter. In that case the hearing by the previous Bench comes to nothing and the Bench constituted afresh by the Chief Justice has to hear out the whole case afresh.

It has also been suggested on the other side that a "case" may mean a part of a case. In my opinion, that submission is not well founded; because, if that argument were accepted and pushed to its logical conclusion, it may make the provisions of the main clause (3) of Article 145 nugatory. Article 132 of the Constitution has been, as indicated above, excepted from the operation of the proviso to clause (3). Suppose an appeal is brought to this Court under Article 132 of the Constitution as the case involved substantial questions of law as to the interpretation of the Constitution. That case besides involving questions of that character, may also involve other questions. If the argument that a "case" includes part of a case were accepted, then it will be permissible for a Constitution Bench to hear the questions of constitutional importance and leave the rest of the case to be determined by a Division Court, though such a case is expressly excluded from the operation of the proviso and thus is directly within the tems of the main clause (3). Hence every case coming before this Court involving a question of constitutional importance may be dealt with in part in so far as it relates to that question by a Constitution Bench and the remaining part by a Division Court. That, in my opinion, was not intended by the framers of the Constitution. The term "case" therefore must mean the whole matter in controversy before this Court. Such a matter may relate to one of several questions in controversy in the original

Court, if the determination of that question is sufficient to dispose of the case within the meaning of the Explanation to Article 132 of the Constitution.

It was further argued by the learned Attorney-General that the whole clause (3) of Article 145 along with the proviso must be read together. But even so read, the language of clause (3) does not warrant the hearing of the case piecemeal by different Benches unless it comes within the purview of the proviso. The proviso is meant to cover only a limited class of cases which otherwise would have come within the purview of the main clause (3). But the proviso cannot have a larger effect than is justified by its language, *viz.*, that only a question of that description has to be referred for the opinion of the larger Bench, the case itself remaining on the file of the smaller Bench. The proviso thus makes a clear distinction between a " case " and a " question ".

It has also been said that there is an inherent power in the Court to transact its business according to its established practice. In the first place, this Court is still in its formative stages and it cannot be said to have an " established practice ". Secondly, it cannot establish a practice in the teeth of the provisions of the Constitution which it is pledged to uphold.

The reference to the decision of the Privy Council in *Moulvi Muhammad Abdul Majid* v. *Muhammad Abdul Aziz*[1], is not apt because in that case the hearing at the two stages of the trial was to be done by a Court of co-ordinate jurisdiction ; that is to say, a Court which could hear and determine the whole case or each of the two parts of the case taken separately by itself, unlike the present case in which the two parts of the hearing have been done by two Courts of unequal power. Similarly the reference to the maxim " *cursus curiae est lex curiae* " of Coke, C.J., in *Burrowes* v. *High Commission Court*[2], referred to in *Habibar Rahaman* v. *Saidannessa Bibi*[3], and to the other cases all proceed on the assumption that there is nothing in the statute law against such a course being taken. But, in my opinion, such a nebulous practice is opposed to the positive provisions of clause (3) of Article 145.

In my opinion, therefore, the present case comes directly within the main clause (3) of Article 145 of the Constitution and is admittedly not covered by the proviso to that clause. That being so, the petitioner's appeal to this Court has not been heard and determined in accordance with the procedure established by this Constitution and therefore the petitioner is entitled to the benefit of the protection afforded by Article 21 of the Constitution. His appeal, therefore, has got to be heard and determined in accordance with the procedure laid down in Article 145 (3) of the Constitution. I would therefore allow the petition to this extent only that the appeal be heard by a Constitution Bench on a declaration that the judgment of the Division Court, dated the 5th March, 1954, is not that of a competent Court.

Order by the Court.—In accordance with the Judgment of the majority, the Petition is dismissed.

. G.R./K.S. *Petition dismissed.*

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction.]

PRESENT :—VIVIAN BOSE, B. JAGANNADHADAS AND B. P. SINHA, JJ.

Mst. Raj Kali Kuer .. *Appellant**

v.

Ram Rattan Pandey .. *Respondent.*

Hindu Law—Religious office—Hereditary right of Pujaris or Archakas of temple—If can be inherited by females.

The usage of a female succeeding to a priestly office and getting the same performed through a competent deputy is one that has been fairly well-recognised. There is nothing in the textua

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1. (1896) L.R. 24 I.A. 22 : I.L.R. 19 A. 155 (P.C.).

2. 3 Bulst. 48 at p. 53 : 81 E.R. 42.

3. (1923) I.L.R. 51 Cal. 331 at p. 335.

*Civil Appeal No. 136 of 1953. 7th April, 1955.

Hindu law to the contrary. Nor can it be said that the recognition of such a usage is opposed to public policy, in the Hindu law sense. Subject to the proper and efficient discharge of the duties of the office, there can be no reason either on principle or on authority to refuse to accord to a female the right to succeed to the hereditary office held by her husband and to get the duties of the office performed by a substitute excepting in cases where usage to the contrary is pleaded and established. [Such usage though pleaded was not made out by any evidence in the instant case.]

If the temple is a private one or the idol therein is not one *shastrically* consecrated the right of a female to succeed to the office of *pujari* or *archaka* is much stronger and cannot be seriously challenged.

Appeal by Special Leave from the Judgment and Order, dated the 4th day of May, 1949, of the High Court of Judicature at Patna in Appeal from Appellate Decree No. 1918 of 1947 against the Decree, dated the 23rd day of July, 1947, of the Subordinate Judge, Arrah, in Appeal No. 137 of 1946 arising from the Decree, dated the 29th March, 1946, of the Court of the 2nd Munsif at Arrah in Suit No. T. S. 120 of 1943.

R. C. Prasad, Advocate, for Appellant.

S. P. Varma, Advocate, for Respondent.

The Judgment of the Court was delivered by

Jagannadhadas, J.—This is an appeal by leave granted under Article 136 (1) of the Constitution against the second appellate judgment of the High Court of Patna. It relates to the office of *Pujari* and *Panda* of a famous temple in the town of Arrah in the State of Bihar, known as the temple of Aranya Devi and Killa Ki Devi. The appellant before us—a woman—brought this suit claiming joint title to the office along with the defendant and as such entitled to perform the *Puja* either by herself or through her *Karinda* and to get a half share in the income of offerings of the said *Asthan*. It is the admitted case that this office belongs to the family of both the parties and that the duties of the office were being jointly performed by the defendant and his deceased brother, Rambeyas Pande, and that they were enjoying the emoluments jointly. The plaintiff—the widow of Rambeyas Pande—claims to have suceeded to her husband's share in this property and bases her suit on the said claim. In the written statement the defendant raised three main defences, two out of which are (1) the plaintiff was not the legally wedded wife of his brother, Rambeyas Pande, and (2) during the life time of Rambeyas Pande, there was a division between them with reference to the office of *Pujari* and *Panda* belonging to this family in respect of two temples (*a*) at Arrah and (*b*) at Gangipul, that the office of *Pujari* at Gangipul was given to the plaintiff's husband and that the temple of Aran Devi at Arrah was given to the defendant and that since then, *i.e.*, for about 11 years prior to the date of the suit, the plaintiff's husband had no connection with the office of *Pujari* in this temple nor with the receipt of any offerings therein. Both these contentions were found against the defendant by the trial Court as well as the by first appellate Court and they have become conclusive. The further and third defence raised by the defendant was that the property in suit, *viz.*, the office of *Pujari* and *Panda* of the temple cannot be inherited by a female. The contention is set out in the following terms in the written statement.

"The plaintiff is not at all entitled to the office and the post of Pujari and Panda of Aran Devi and she is not entitled to get 1/2 share or any share in the income and offering of the said Asthan, nor has she got any right to perform Puja as a Panda personally, or through her karinda and to get the income, etc. This is against the custom and usage and practice and also against the Sastras. The property in suit is such as cannot be inherited by a female".

It is the question thus raised which has got to be considered in this appeal.

The trial Court held against this contention in the following terms.

"No authority has been cited not any custom proved to show that female cannot inherit a property of this nature".

The first appellate Court also affirmed this view as follows :

"The defendant's objection that the plaintiff being a female is not authorised to hold the office of a priest of the Aranya Devi temple is not borne out by any evidence or material on the record.

There is nothing to show that by reason of her sex she is debarred from holding this office either by religion, custom or usage. Moreover admittedly she holds the office at the Gangi temple ".

On the findings arrived at by the trial Court and the first appellate Court, the plaintiff got a decree as prayed for declaring her right to half share in the office and for recovery of mesne profits on that footing. On second appeal to the High Court the learned Judges went into the question at some length and were of the opinion that " the plaintiff being a female is not entitled to inherit the priestly office in question and her claim to officiate as a priest in the temple by rotation cannot be sustained. The declaration sought for by her that she is entitled to the office of Pujari cannot, therefore, be granted ". They held, however, " that she is not debarred from being entitled to be maintained out of the estate of her husband which, in the particular case, happens to be no other than the emoluments attached to the priestly office in the shape of offerings made to the deity which office was undoubtedly hereditary ". They further held that " she will be entitled to receive from the defendant half the amount of the offerings in lieu of her maintenance " and they varied the decree of the trial Court accordingly. The short question that arises, therefore, for consideration in this appeal is whether a Hindu female is entitled to succeed to the hereditary priestly office of a *Pujari* and *Panda* held by her husband in a temple and to receive the emoluments thereof. This is a question about which there has been some difference of opinion in the decided cases. It requires close examination.

That religious offices can be hereditary and that the right to such an office is in the nature of property under the Hindu Law is now well established. A Full Bench of the Calcutta High Court in *Manohar* v. *Bhupendra*[1], has laid this down in respect of *Shebaitship* of a temple and this view has been accepted by the Privy Council in two subsequent cases in *Ganesh* v. *Lal Behary*[2] and *Bhabatarini* v. *Ashalata*[3]. In a recent judgment of this Court reported as *The Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar*[4], this view has been reiterated and extended to the office of a Mahant. On the view that *Shebaiti* is property, this Court has also recognised the right of a female to succeed to the religious office of *Shebaitship* in the case reported as *Angurbala* v. *Debabrata*[5], where the question as to the applicability of Hindu Women's Right to Property Act to the office of *Shebaitship* came up for consideration. On the same analogy as that of a *Shebaiti* right, the right of a hereditary priest or *Pujari* in a temple must also amount to property where emoluments are attached to such an office. Indeed, some of the decisions which have recognised the *Shebaiti* right as property appear to be cases where the *Shebaiti* right combines the priestly office of a *Pujari* of the idol with the office of the manager of the temple, who in South India, is known by the name of *Dharmakarta*. As early as in *Mitta Kunth Audhicarry* v. *Neerunjun Audhicarry*[6], it was recognised that hereditary priestly office in a family is property liable to partition. A number of other decisions to be noticed in the latter part of this judgment recognise this position. The learned judges of the High Court in their judgment in the case under appeal, have attempted to distinguish the present case from that of the case of the *Shebaitship* and have come to the conclusion that while in respect of *Shebaiti* right a woman may succeed by heirship, she is not entitled to such succession in respect of the right of a *Panda* and *Pujari*. But in making this distinction they do not negative the idea that the right to the office of the *Pujari* itself is property to which a female could succeed, but for her supposed disqualification. The disqualification is said to arise with reference to the duties attached to this office, and it is said that in this respect it differs from the office of a *Shebait*.

Now there can be no doubt that while in one sense the right to such a religious office is property it involves also substantial elements of duty. As has been stated by this Court in *Angurbala* v. *Debabrata*[5] and in *The Commissioner, H. R. E.*,

1. A.I.R. 1932 Cal. 791.
2. (1936) L.R. 63 I.A. 448 : 71 M.L.J. 740 (P.C..)
3. L.R. 70 I.A. 57 : (1943) 2 M.L.J. 70 (P.C.).
4. 1954 S.C.J. 335 : 1954 S.C.R. 1005 : (1954) 1 M.L.J. 596 (S.C.).
5. 1951 S.C.J. 394 : 1951 S.C.R. 1125 (S.C.).
6. (1875) XIV B.L.R. 166.

Madras v. *Sri Lakshmindra Thirtha Swamiar*[1], " both the elements of office and property, of duties and personal interest are blended together (in such offices) and neither can be detached from the other ". It must also be recognised that in respect of such offices especially where they are attached to public institutions, the duties are to be regarded as primary and that the rights and emoluments are only appurtenant to the duties. See the observations of Justice Page in *Nagendra* v. *Rabindra*[2], at pages 495 and 496 and that of Justice Sadasiva Aiyar in *Sundarambal* v. *Yogavanagurukkal*[3], at page 564, as also of Mukherjea on Endowments (1952 Edn.) page 201. If, therefore, it is found that the recognition of a female's right to succeed to the hereditary office of *Pujari* in a temple held by her husband is incompatible with due discharge of the duties of the office, her right to succeed must be negatived. The correct approach to a question of this kind has been laid down by the Privy Council in a case which relates to a Mohammadan religious office but would equally be applicable to a Hindu religious office. In *Shahar Bano* v. *Aga Mahomed Jaffer Bindaneem*[4], their Lordships, after noticing the view taken by the learned Judges of the Calcutta High Court, that " there is no legal prohibition against woman holding a mutwalliship when the trust, by its nature involves no spiritual duties such as a woman could not properly discharge *in person or by deputy* " approved this view of the High Court and said " it appears to their Lordships that there is ample authority for the proposition ". The question, therefore, that requires consideration in the present case is whether the office of the *Pujari* and *Panda* in a temple involves such duties as could not be discharged by a female in person and if so, whether she is also incompetent to get the same discharged by a deputy.

Now for this purpose it is desirable to have a clear idea of the duties of a *Pujari* in an ordinary Hindu temple. A *Pujari* has to perform the prescribed daily worship of the image as well as the special worship of a periodical nature on particular occasions and for prescribed festivals during the year. In *Ramabrahma Chatterjee* v. *Kedar Nath Banerjee*[5], Justice Asutosh Mookerjee indicated the daily routine of worship in the following passage.

> " The normal type of continued worship of a consecrated image consists of the sweeping of a temple, the process of smearing, the removal of the previous day's offering's of flowers, the presentation of fresh flowers and water, and other like practices. It is sufficient to state that the deity is, in short, conceived as a living being and is treated in the same way as the master of the house would be treated by his humble servant. The daily routine of life is gone through with minute accuracy ; the vivified image is regaled with the necessaries and luxuries of life in due succession, even to the changing of clothes, the offering of cooked and uncooked food, and the retirement to rest ."

In Saraswati's Hindu Law of Endowments[6], the nature of the daily worship of a consecrated idol in a temple is set out at pages 134 and 135 in detail. It must be recognised that the daily worship differs according to the tenets and usages of the religious sect for which the temple is intended and the idol is consecrated. But whatever may be the details of the worship and the variations therein there can be no doubt that the ministration of various services involving personal touch of the idol, and, often enough, the recitation of religious hymns inclusive of *Vedic* hymns are amongst the normal and essential features of a *Pujari's* duties, at any rate in temples where the worship is conducted according to the *Shastras*. It is also undisputed that according to Hindu Shastras the functions of a *Pujari* can be performed only by certain limited classes and involves special qualifications and that these classes may vary with the nature of the institution. Now, whatever may have been the position in early times, of which there is no clear historical evidence, it appears to have been well established in later times that a female, even of the recognised limited classes, cannot by herself perform the duties of a *Pujari*. Even at a time when the institution of temple worship had probably not

1. 1954 S.C.J. 335 : 1954 S.C.R. 1005 : (1954) 1 M.L.J. 596 (S.C.).
2. (1925) I.L.R. 53 Cal. 132 : A.I.R. 1926 Cal. 490.
3. (1914) 26 M.L.J. 315 : I.L.R. 38 Mad. 850.
4. (1906) L.R. 34 I.A. 46 at 53 : 17 M.L.J. 52 (P.C.).
5. A.I.R. 1923 Cal. 60 at 62.
6. The Hindu Law of Endowments by Pandit Prannath Saraswati, T.L.L. 1892. (1897 Edn.).

come into general vogue, the incapacity of a woman to recite *Vedic* texts, to offer sacrificial fire, or to perform sacramental rites, is indicated in certain texts of Manu. (*See* Sacred Books of the East, Manu, Vol. 25, pages 330 and 437, Chapter 9, section 18 and Chapter 11, section 36.) Whether it is on the basis of these texts or for some other reason her incapacity to discharge, in person, the duties of the *Pujari* appears to have been well settled in later times as appears from the following text from Brihan-Naradiya Purana quoted in Sarsaswati's Hindu Law of Endowments at page 136.

" Women, those uninvested with the sacred thread, (*i.e.* the members of the Dvija class before the initiation ceremony has been performed for them), and Sudras are not competent to touch images of Vishnu or Siva. A Sudra, one uninvested with the sacred thread, a woman or an outcaste, having touched Vishnu or Siva, goes to hell ".

This passage, in terms, refers to the images of Vishnu and Siva but it may reasonably be assumed, in the absence of any evidence to the contrary that in practice the incapacity of a female to discharge the duties of a *Pujari* by herself extended, at any rate, to all public temples where an image of whatever form had been consecrated and installed according to the *Shastras*. Indeed, all the cases on the subject have assumed this incapacity of the female. The point of controversy has been whether she is also imcompetent to get the duties discharged by employing a qualified substitute. If her competence in this behalf is recognised and can be accepted there is no reason why she should not be held entitled to succeed to the office. Thus the really imporant question for consideration in this case is whether the duties of the *Pujari*'s office can be got done by a substitute and if so is there any particular reason or clearly established usage, against a female employing such a substitute and thus becoming entitled to the office.

In early Hindu society a priestly office could have relation only to the performance of various kinds of *Vedic* rituals and sacrifices either of a daily and routine nature or of a periodical and special nature. In theory a *Brahmin* is to perform such functions for himself by himself, while persons of other classes should get them done through qualified *Brahmins*. On principle a priest in the Hindu concept is chosen as such with reference to his personal qualities and competence. The system of hereditary priesthood, however, with the possibility of persons not fully competent, suceceding to or occupying such an office, appears to have come into vogue from fairly early times. It appears, however, that from the very nature of the situation, the temporary discharge of the priestly function by a substitute in the place of the hereditary pirest was a matter of inevitable necessity since the Hindu *Shastras* recognised temporary and casual disqualifications like that of birth and death pollution. But there does not appear to be any indication in the early books of any general practice about the functions of priestly office being discharged by proxies. In comparitively later days, however, there is clear indication of such a practice. In Saraswati's Hindu Law of Endowments, at page 56, it is stated that in the *Padma Purana* and other treatises incapacitated persons are directed to have the worship performed through *Brahmins*. This statement is with reference to the performance of service of an idol and has presumably reference to the incapacity of persons occupying a priestly office. In Colebrooke's translation of the Digest of Hindu Law on Contracts and Successions with a commentary by Jagannatha Tercapanchanana (4th Edition, published by Higginbotham & Co., Madras, 1874), Vol. I, Book II, Chapter III, Section II, pages 360 to 381 deal with the topic of partnership among priests jointly officiating at holy rites. A perusal thereof and particularly of placita 28 to 44 containing citations from various *Smrutis* with Jagannatha's commentary thereon, clearly indicate that the institution of hereditary priestship, became established by that date and that the performance of such priestly functions by substitutes had definitely come into vogue. Various rules are propounded as to the sharing of remuneration between the substitute priest and the hereditary priest when the former happens to perform the functions in the place of the latter. It is to be noticed that these passages from Jagannatha's Digest refer in terms only to priestly office by way of officiating at holy rites, *i.e.*, sacrifices and other *Vedic* or *Shastric* functions but do not in terms refer to the discharge of a priest's duties in relation

to the worship of an idol in a temple. This is all the more remarkable because by the date of Jagannatha's Digest the institution of worship of consecrated idols in temples had become long since fairly established. The probable explanation is that Jagannatha's Digest is a commentary on selected texts mostly of the various *Smrutis* from which he quotes and that in the days of the *Smrutis* the temple worship does not appear to have come sufficiently into vogue. The historical origin and growth of temple worship has been fully dealt with in Saraswati's Hindu Law of Endowments and has been also noticed in the referring judgment in *Annaya Tantri* v. *Ammaka Hengsu*[1]. It is pointed out therein that according to Hindu sentiment the performance of the duties of an *Archaka* or *Pujari* for an idol has been considered sinful and it required inducements by way of liberal grants of land and promise of substantial perquisites to attract competent persons for the office of *Pujari* or *Archaka*. This, in course of time and with the change in social conditions and economic values, rendered the offices of *Panda* and *Pujari* in almost all the famous shrines in India, a lucrative affair, and has enabled the hereditary priests to get the functions discharged by paid substitutes and themselves enjoy a substantial margin of income. Here just in the same way as the patronage of the kings or the society may have been a great incentive to the development of the system of discharge of hereditary priestly functions by substitutes in relation to sacrificial and *Vedic* religious rites, the phenomenal development and worship of idols in temples and the substantial emoluments which in course of time rendered the discharge of priestly office lucrative must have brought into vogue the employment of substitutes for performance of the duties of the priests not only for sacrificial or other religious rites but also for temple worship. Whether and how far this practice is permitted by the *Shastras* is not the question before us. But it cannot be denied and is indeed a matter of common knowledge, that at present day, hereditary priestly offices are, as often as not, performed by proxies, the choice of proxy being, of course, limited to a small circle permitted by usage. The question for consideration of the Courts is, whether, in this state of things, a female is to be excluded from succession to the hereditary office of *Pujari* on account of her well recognised personal disqualification to officiate as such *Pujari* for the *Shastrically* installed and consecrated idols in the temples and whether she is to be denied the capacity to retain the property by getting the priestly duties efficiently discharged through a competent substitute. The only basis for the alleged denial is a passage from Jagannatha's Digest which is as follows: (*vide* Vol. I, page 379, commentary under placitum 43).

> "Wives and others, disqualified by sex for the performance of holy rites, cannot appoint a substitute; as a defiled person cannot perform a solemn act ordained by the Vedas, therefore wives have no property in the office of priest".

Now apart from the question whether this passage can be taken to be sufficiently authoritative, there has been some difference of opinion as to the correct import thereof. In *Sundarambal Ammal* v. *Yogavanagurukkal*[2], this passage has been relied upon by Justice Sadasiva Aiyar as showing that women are incompetent to discharge the functions of a priest even through a substitute and that, therefore, they have no right of succession to the office. The learned Judges of the High Court in the present case have also relied on it. In *Annaya Tantri* v. *Ammaka Hengsu*[1], Justice Seshagiri Aiyar in his referring judgment has referred to this passage and was of the opinion that it does not express a specific view. In Ganapathi Iyer on Hindu and Mahomedan Endowments (2nd Edition) the learned author while commenting on this very passage says as follows at page 453 of his book:

> "Jagannatha there considers the question whether wives and others have a title to the succession to this priestly office. As usual with the discussions of Jagannatha it is difficult to say what his final opinion is. But we should certainly think that Jagannatha's opinion is that women can inherit doing the duties through a substitute, but enjoying the emoluments attached to that office".

It appears on a careful consideration of the disputed passage with reference to its context, that this view of the learned author is correct. In any case the passage

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1. (1918): 35 M.L.J. 196: I.L.R. 41 Mad. 886 (F.B.).
2. (1914) I.L.R. 38 Mad. 850: 26 M.L.J. 315.

cannot be definitely relied upon as an authority for the contrary view. The discussion in connection with which this passage occurs in the commentary is under placitum No. 43 in section II of Chapter III, Book II, which is a text from *Narada* relating to hereditary priests. The statement relied on occurs at a place where there is an attempt to reconcile the disqualification of the female to discharge the functions of a hereditary priest, and the recognition of her right to succeed to all property including a hereditary office. The relevant portions of the discussion are herein below set out :

> " It is doubted whether wives and others have a title to this succession, although the partition, founded on the admission of a right vesting in agraharicas and other officiating priests, ought to be similar to the partition of inheritance in general. As the wife's title to succession, on failure of heirs in the male line as far as the great-grandson, will be declared under the head of Inheritance, what should reverse her title in this instance ? It should not be argued, that the wife can have no right to the village, because as a woman, she is disqualified for the performance of holy rites, and because the wives of agraharicas and others are totally incapable of receiving tila delivered as a gift to priests. The tila may be received, and the rites be performed, through the intervention of a substitute. Let it not be argued, that, were it so, a property in the sacrificial fee and regular dues would vest in the substitute. The wife may have the benefit of property acquired by the substitute, as a sacrificer has the benefit of rites performed by an officiating priest. However, there is this difference : the sacrificer acquires merit from rites performed by an officiating priest, and none is ever acquired by the intermediate performer of the rites ; but if the duty of the officiating priest be performed by a substitute, property in the sacrificial fee is at first vested in the substitute, and through him, in the widow entitled thereto. It is alleged, that there is no authority for this construction.
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> The text which ordains that " a person unable to act shall appoint another to act for him ", is the foundation of this construction ; but the property of an outcaste, or other person disqualified for solemn rites, is absolutely lost, in the same manner with his right to the paternal gold, silver, and the like. This will be explained in the fifth book on Inheritance. *Wives and others, disqualified by sex for the performance of holy rites, cannot appoint a substitute : as a defiled person cannot perform a solemn act ordained by the Vedas : therefore wives have no property in the office of priest* ".

At the end of the discussion there is the following significant passage :

> " Therefore the difficulty is thus reconciled ; women are entitled to that only for which they are qualified. In regard to the assertion, that women, being disqualified, cannot appoint a substitute, this must be understood : being disqualified for solemn acts ordained by the Vedas, they cannot appoint a substitute for such acts ; but, qualified for worldly acts, nothing prevents the appointment of a substitute for temporal affairs ; and the right should devolve on the next in succession, under the text quoted in another place (Book 5, v. 477) and because women are dependent on men. Grain and similar property may be consumed by a woman entitled to the succession ; but gold, silver, and the like, should be preserved : if she cannot guard it, let it be entrusted to her husband's heir, as will be mentioned under the title of inheritance. Here, since a woman cannot preserve the office, it should be executed by her husband's daughter's son, or other heir ; but the produce should be enjoyed by the woman. However, should the daughter's son be at variance with his maternal grandmother, it may be executed by another person ; he is not entitled to his maternal grandfather's property, if that grandfather leaves a wife ; and should the maternal grandmother litigate, it must be amicably adjusted ".

The concluding portion seems rather to indicate that the more categorical passage underlined above and relied upon is in the nature of an objection which is being answered and that the final conclusion is the recognition of a right to succeed by getting the duties of the office performed by the next male in succession. The learned Judges of the High Court have in fact noticed this concluding passage but have missed its correct import.

It is desirable now to consider how this question stands with reference to the decided cases in the various High Courts. A fairly substantial number of cases appear in the reports of the Madras High Court. One of the earliest decisions is that of the Madras Sadar Diwani Adalat in *Seshu Ammal* v. *Soundararaja Aiyar*[1], wherein it was held, following the opinion of the Sadar Court *Pandits*, that a woman was disqualified by reason of her sex from inheriting the office of *Acharyapurusha* but the same *Pandits'* opinion distinctly recognises that religious offices like those of an *Archaka* or *Pujari* can be held by a female, by her getting the duties thereof performed through a competent male substitute. In *Tangirala Chiranjivi* v. *Rama Manikya Rao. Rajaya Lakshmamma*[2] it was stated that there was no basis for the assumption that a minor,

1. (1853) M.S.D.A. 261. 2. (1914) 27 M.L.J. 179.

a female, or a person unlearned in the *Vedas*, will lose the right to service in the temple and that the onus will be on the person who alleges the disqualification to prove it. the learned Judges categorically asserted (apparently as being a matter within general knowledge and experience) that " service in temples is being performed by proxies." In *Ramasundaram Pillai* v. *Savundaratha Ammal*[1], the learned Judges say as follows :

" It is undeniable that this and other High Courts have in numerous cases acted on the assumption (which was not questioned) that women could hold religious offices and get the duties performed by proxy ".

They further say

" It may be that the parties concerned are so accustomed to the idea of female office-holders with proxies that it has usually not occurred to them to question the legality of such a state of affairs and that in the absence of contest, the Courts have somewhat too readily assumed it to be legal without requiring proof of a valid custom in support of it."

In *Rajeswari Ammal* v. *Subramania Archaka*[2], the learned Judges state as follows :

"We are of the opinion that a female is not, under Hindu law or custom, disqualified from succeeding to a hereditary religious office and getting such duties as she may be disqualified by reason of her sex from performing, performed by proxy."

The only dissentient view against this current of authority in the Madras High Court was that of Justice Sadasiva Aiyar in *Sundarambal Ammal* v. *Yogavanagurukkal*[3]. He expressed a strong opinion that the practice of allowing the priestly office to be performed by a substitute excepting for merely temporary occasions or casual purposes, is wholly opposed to public policy and that it should not be recognised. In a later judgment in *Annaya Tantri* v. *Ammaka Hengsu*[4], relating to the same topic he (Justice Sadasiva Aiyar) stated as follows :

" It is notorious that the deputy is usually *chosen* on the principle of a Dutch auction. The man who agrees to allow the widow to retain the largest portion of the emoluments of the office and receive the least as his own remuneration is given the place of the deputy ".

The learned Judge pointed out that

" such a practice was mischievous and that even if it was sanctioned by usage it ought not to be recognised by Courts ".

There is certainly force in this comment. But in a matter of this kind where there is no express prohibition in the texts for the performance of the duties of the *Pujari's* office by the appointment of substitutes and where such an office has developed into a hereditary right of property, the consideration of public policy cannot be insisted on to the extent of negativing the right itself. In such a situation what has to be equally emphasised is the duty-aspect of the office and to insist, on the superior authorities in charge of the temple exercising vigilantly their responsibility by controlling the then incumbent of the priestly office in the exercise of his rights (or by other persons having interest taking appropriate steps through Court), when it is found that the services are not being properly or efficiently performed. In view of the peculiar nature of such offices as combining in them both the element of property and the element of duty, it cannot be doubted that superior authorities in charge of the institutions or other persons interested have this right which may be enforced by appropriate legal means. In *Raja Peary Mohan Mukherji* v. *Manohar Mukherji*[5] the Privy Council has recognised that notwithstanding the personal interest of a *shebait* in respect of his office, the performance of the duties thereof has got to be safeguarded and that he can be removed where he has put himself in a position in which the obligation of his office can no longer be faithfully discharged.

So far as the Madras High Court area is concerned, the controversy has been settled by the Full Bench case in *Annaya Tantri* v. *Ammaka Hengsu*[3] where the view taken by Justice Sadasiva Aiyar was specifically overruled on the ground that

1. A.I.R. 1915 Mad. 725.
2. (1915) I.L.R. 40 Mad. 105: 30 M.L.J. 222.
3. (1914) I.L.R. 38 Mad. 850 : 26 M.L.J. 315.
4. (1918) I.L.R. 41 Mad. 886 : 35 M.L.J. 196.
5. (1921) L.R. 48 I.A. 258: 41 M.L.J. 68. (P.C.).

"there were numerous decisions of the Madras High Court in conformity with the decisions of the other High Courts by which the widow and the daughter and the daughter of the last male *Archaka* are held entitled in accordance with the established user to succeed to the office of Archaka discharging his duties by deputy and to transmit it to their heirs, who as male heirs are preferred to female, and will generally be competent to perform the duties in person."

These decisions of the Madras High Court seem to recognise both the factum and validity of the usage as one that has been accepted by the Courts not only within its own jurisdiction but also within the jurisdiction of the other High Courts. It is urged, however, that there is no such usage that can be definitely said to be established with reference to the decisions of the other High Courts.

As regards the other High Courts doubtless the actual cases appearing in the reports about this point are not many. In the Bombay High Court one of the earliest decisions is the case in 1866 of *Keshavbhat bin Ganeshbhat* v. *Bhagirthibai kom Narayanbhat*[1] where the learned Judges say as follows :

"With respect to the objection, that a Hindu female cannot perform the duties which attach to the office for the maintenance of which the allowance was granted, it may be observed that the defendant had not proved the existence of any usage in conformity with his allegation ".

The claim in question in that case was to an annual allowance paid from the Government Treasury to the members of a family for the maintenance of certain religious services at the temple of *Mahadev* at Baneshvar near Poona. In *Sitarambhat et al* v. *Sitaram Ganesh*[2], the head-note shows as follows :—

"*Semble*, that an hereditary priestly office descends in default of males through females ".

This is apparently the assumption on which that judgment appears to have proceeded though the matter does not appear to have been specifically so decided. In Calcutta one of the early cases is *Poorun Narain Dutt* v. *Kasheessuree Dosee*[3]. There it was recognised that a woman can succeed to a priestly office and the contention to the contrary was overruled on the ground that the lower appellate Court found the same as a fact on the evidence and that no one but the defendant had raised the contention. In *Joy Deb Surma* v. *Huroputty Surma*[4] the same question was raised, *viz.*, whether according to Hindu Law a woman can succeed to the priestly office and reliance appears to have been placed for that contention on the passage from Colebrooke's Digest already above referred to. In view of this contention the learned Judges remitted the case to the lower Court for determination of the question whether with reference to any particular custom or rule of Hindu law a woman is entitled to succeed to the priestly office. In that case it was the office of the *Dolloi* of the temple. It does not appear what the finding received was and how this matter was finally decided. In *Radha Mohun Mundul* v. *Jadoomonee Dossee*[5], their Lordships of the Judicial Committee quoted with apparent approval the following passage from the judgment of the trial Court.

"They (the members of the family) merely say that as the said properties are of a debutter character, they are not susceptible of division among the shareholders ; and that since the plaintiff is a childless widow, she is not competent to carry on the service of the gods. That the properties in question do not admit of any partition among the co-sharers is a fact which must be admitted by me ; but I do not see any reason why a widow of the family should be incapacitated from superintending the service of the gods. It is not urged by the defendants that any such rule has been laid down in the family, and that under it the widows have been excluded from the above superintendence. On the other hand, among the Hindus, persons belonging to no other caste except that of Brahmins can perform the service of a god with his own hands, that is, worship the idol by touching its person. Men of other castes simply superintend the service of the gods and goddesses established by themselves, while they cause their actual worship to be performed by Brahmins. Thus, when persons of the above description can conduct the service of idols in the above-mentioned manner, why should not the widows of their family be able to carry on worship in a similar way ? . . . .
Consequently, there is nothing to prevent the Court from finding that the plaintiff has a right to hold possession of the debuttur properties enumerated by the defendants in the 12th paragraph of their written statement, and to superintend the service of the gods conjointly with the other co-sharers".

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1. (1866) III B.H.C.R. A.C.J. 75.
2. (1869) VI B.H.C.R.A.C.J. 250.
3. (1865) III W.R. 179.
4. (1871) XVI W.R. 282.
5. (1875) XXIII W.R. 369.

In *Mahamaya Debi* v. *Haridas Haldar*[1], it has been recognised that according to custom, the *palas* of Kalighat Shrine in Calcutta are heritable and and that it was immaterial whether the heir is a male or a female. This must necessarily have involved the recognition of the capacity of the female to get the worship performed by a male substitute, who is to be taken from a limited class. As has been already noticed, the reported cases dealing with this matter outside the Madras High Court do not appear to be many. At any rate, no others have been brought to our notice dealing with this question directly, though there are many cases relating to the question of succession to the office of *Shebait* and the performance of duties thereof by proxy, which is a matter distinguishable from a case relating to the office of *Pujari* or *Archaka* simpliciter. The paucity of decided cases in the reports of the other High Courts may very well be due to what has been pointed out in one of the Madras cases, *viz.*, that the practice of females succeeding to this office and getting the duties thereof performed by a substitute was so common and well-recognised that it has not been seriously contested and brought up to the Courts. Further the institution of private family temples and the endowments of large and substantial properties for the *Deb-seva* in such temples though somewhat uncommon in South India is fairly common in Bengal and some other States. In view of the *Dayabhaga* system of law of succession prevalent in Bengal and the very much larger number of occasions for wives and daughters succeeding to a sonless coparcener in *Dayabhaga* joint families, the practice of females succeeding to the priestly office and of getting the duties performed by other members of the family as proxies in their places must, by the very situation, have been common in these areas. The case reported in *Jalandhar Thakur* v. *Jharula Das*[2] is a case relating to the *Shebait's* (priest's) office in the *Singheswar* temple of Bhagalpur and the facts therein show that there was unquestioned female succession to the office. It is a clear indication of the prevalence of the usage of female succession to priestly office in the State of Bihar from which the present case arises.

A careful review, therefore, of the reported cases on this matter shows that the usage of a female succeeding to a priestly office and getting the same performed through a competent deputy is one that has been fairly well-recognised. There is nothing in the textual Hindu Law to the contrary. Nor can it be said that the recognition of such a usage is opposed to public policy, in the Hindu Law sense. As already pointed out the consideration of public policy can only be given effect in the present state of the law, to the extent required for enforcing adequate discharge of the duties appurtenant to the office. Subject to the proper and efficient discharge of the duties of the office, there can be no reason either on principle or on authority to refuse to accord to a female the right to succeed to the hereditary office held by her husband and to get the duties of the office performed by a substitute excepting in cases where usage to the contrary is pleaded and established. In the present case such a usage was pleaded by the defendant in his written statement but no evidence of it was given. Indeed as pointed out by the first appellate Court, the plea that there has been a partition of the offices of the two temples and the implied recognition of the plaintiff's right to the office of the other temple at Gangupal appears to indicate the contrary usage. We are accordingly of the opinion that the claim of the plaintiff-appellant is made out and that she is entitled to succeed.

The discussion above is more germane to the case of a public temple wherein the idol has been *Shastrically* installed and consecrated and the worship is in accordance with the *Shastras*. There is nothing on the record to show whether the temple in this case falls within this category. If, however, the temple is a private one or the idol therein is not one *Shastrically* consecrated, the case in favour of the plaintiff is much stronger and her right cannot be seriously challenged. At this stage, it is desirable to mention one other matter. In the present case the emoluments attached to the office are stated to be the daily and other offerings made to the deity at the worship by the visiting devotees. Both the parties to this case have come up to

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1. (1914) I.L.R. 42 Cal. 455 : A.I.R. 1915 Cal. 161 (2).

2. (1914) L.R. 41 I.A. 267 ; I.L.R. 42 Cal. 244 : 27 M.L.J. 100 (P.C.).

Court on the common footing that it is this which constitutes the emoluments. Whether and how far such votive offerings can be appropriated by a *Pujari* for his emoluments if the temple is a public institution (*i.e.*, not a private family temple) and whether any usage in this behalf is valid is a matter which does not arise before us in this case.

In the result, the appeal must be allowed with costs throughout and the decree of the trial Court must be restored.

Appeal allowed.

SUPREME COURT OF INDIA.

(Original Jurisdiction).

PRESENT :—B. K. MUKHERJEA, *Chief Justice*, VIVIAN BOSE, B. JAGANNADHADAS, T.L. VENKATARAMA AYYAR, and SYED JAFER IMAM, JJ.

Rai Sahib Ram Jawaya Kapur and others .. *Petitioners**

v.

The State of Punjab. .. *Respondent.*

Constitution of India (1950)—*Executive order of State Government resulting in a virtual State monopoly of business of publishing text books for schools—Validity—If opposed to Article* 19 (1) (*g*) *of the Constitution.*

The Constitution of India though federal in structure, is modelled on the British Parliamentary system where the executive is deemed to have the primary responsibility for the formulation of Governmental policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State. The executive function comprises both the determination of the policy as well as carrying it into execution. This evidently includes the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State.

It cannot be said that it is always necessary that there must be a specific legislation legalising State trade activities before Government could embark upon a trade or business in furtherance of a particular policy formulated by the executive Government. If the trade or business involves expenditure of funds, it is certainly required that Parliament should authorise such expenditure either directly or under the provisions of a statute. As soon as the Appropriation Act is passed, the expenditure made under the heads covered by it would be deemed to be properly authorised by law under Article 266 (3) of the Constitution.

So long as the trade activities are carried on in pursuance of the policy which the executive Government has formulated with the tacit support of the majority in the legislature, no objection on the score of their not being sanctioned by specific legislative provision can possibly be raised. Objections could be raised only in regard to the expenditure of public funds for carrying on the trade or business and to these the Appropriation Acts would afford a complete answer.

Specific legislation may indeed be necessary if the Government requires certain powers in addition to what they possess under ordinary law in order to carry on the particular trade or business. Thus when it is necessary to encroach upon private rights in order to enable the Government to carry on their business, a specific legislation sanctioning such course would have to be passed.

It cannot be said that the carrying on of the business of printing and publishing text books for schools was beyond the competence of the executive Government without a specific legislation sanctioning such course. But the executive Government are bound to conform not only to the law of the land but also to the provisions of the Constitution. Consequently, even if the executive acts are deemed to be sanctioned by the legislature, yet they can be declared to be void and inoperative if they infringe any of the fundamental rights guaranteed to the citizen. There is no fundamental right in the publishers (of text-books for school students) that any of the books printed and published by them should be prescribed as text books by the school authorities or if they are once accepted as text books they cannot be stopped or discontinued in future. One of the main conditions upon which recognition is granted by Government is that the school authorities must use as text books only those which are prescribed or authorised by the Government. Publishers had no right to insist on any of their books being accepted as text books. There was merely a chance or prospect of any or some of their books being approved as text books by the Government. Such chances are incidental to all trades and businesses and there is no fundamental right guaranteeing them. Again a mere chance or prospect of having particular customers cannot be said to be a right to property or to any interest in an undertaking within the meaning of Article 31 (2) of the Constitution and no question of payment of compensation can arise because the petitioners have been deprived of the same.

Petitions under Article 32 of the Constitution for the enforcement of fundamental rights.

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* Petitions Nos. 652 of 1954 and 71 to 77 and 85 of 1955. 12th April, 1955.

G. S. Pathak, Senior Advocate (*P. N. Mehta* and *G. C. Mathur*), Advocates with him for Petitioners in Petition No. 652 of 1954.

P. N. Mehta and *G. C. Mathur*, Advocates for Petitioners in Petitions Nos. 71 to 77 and 85 of 1955.

S. M. Sikri, Advocate-General for the State of Punjab (*Jindra Lal* and *P. G. Gokhale*, Advocates, with him) for the Respondent in all Petitions.

Petition No. 652 *of* 1954.

The Judgment of the Court was delivered by

Mukherjea, C.J.—This is a petition under Article 32 of the Constitution, preferred by six persons, who purport to carry on the business of preparing, printing, publishing and selling text books for different classes in the schools of Punjab, particularly for the primary and middle classes, under the name and style "Uttar Chand Kapur & Sons." It is alleged that the Education Department of the Punjab Government has in pursuance of their so-called policy of nationalisation of text books, issued a series of notifications since 1950 regarding the printing, publication and sale of these books which have not only placed unwarrantable restrictions upon the rights of the petitioners to carry on their business but have practically ousted them and other fellow-traders from the business altogether. It is said that no restrictions could be imposed upon the petitioners' right to carry on the trade which is guaranteed under Article 19 (1) (*g*) of the Constitution by mere executive order without proper legislation and that the legislation, if any, must conform to the requirements of clause (6) of Article 19 of the Constitution. Accordingly, the petitioners pray for writs in the nature of *mandamus* directing the Punjab Government to withdraw the notifications which have affected their rights.

To appreciate the contentions that have been raised by the learned counsel who appeared for the parties before us, it will be necessary to narrate certain relevant facts. In the State of Punjab, all recognised schools have got to follow the course of studies approved by the Education Department of the Government and the use, by the pupils, of the text books prescribed or authorised by the Department is a condition precedent to the granting of recognition to a school. For a long period of time prior to 1950 the method adopted by the Government for selection and approval of text books for recognised schools was commonly known as the alternative method and the procedure followed was shortly this: Books on relevant subjects, in accordance with the principles laid down by the Education Department, were prepared by the publishers with their own money and under their own arrangements and they were submitted for approval of the Government. The Education Department after proper scrutiny selected books numbering between 3 and 10 or even more on each subject as alternative text books, leaving it to the discretion of the Head Masters of the different schools, to select any one of the alternative books on a particular subject out of the approved list. The Government fixed the prices as well as the size and contents of the books and when these things were done it was left to the publishers to print, publish and sell the books to the pupils of different schools according to the choice made by their respective Head Masters. Authors, who were not publishers, could also submit books for approval and if any of their books were approved, they had to make arrangements for publishing the same and usually they used to select some one of the publishers already on the line to do the work.

This procedure, which was in vogue since 1905, was altered in material particulars on and from May, 1950. By certain resolutions of the Government passed on or about that time, the whole of the territory of Punjab, as it remained in the Indian Union after partition, was divided into three zones. The text books on certain subjects like agriculture, history, social studies, etc., for all the zones were prepared and published by the Government without inviting them from the publishers. With respect to the remaining subjects, offers were still invited from "publishers and authors" but the alternative system was given up and only one text book on each subject for each class in a particular zone was selected. Another change introduced at this time was that the Government charged, as royalty, 5 per cent.

on the sale price of all the approved text books. The result therefore was that the Government at this time practically took upon themselves the monopoly of publishing the text books on some of the subjects and with regard to the rest also, they reserved for themselves a certain royalty upon the sale proceeds.

Changes of a far more drastic character however were introduced in the year 1952 by a notification of the Education Department issued on the 9th of August, 1952 and it is against this notification that the complaints of the petitioners are mainly directed. This notification omitted the word "publishers" altogether and invited only the "authors and others" to submit books for approval by the Government. These "authors and others," whose books were selected, had to enter into agreements in the form prescribed by the Government and the principal terms of the agreement were that the copyright in these books would vest absolutely in the Government and the "authors and others" would only get a royalty at the rate of 5 per cent. on the sale of the text books at the price or prices specified in the list. Thus the publishing, printing and selling of the books were taken by the Government exclusively in their own hands and the private publishers were altogether ousted from this business. The 5 per cent. royalty, in substance, represents the price for the sale of the copyright and it is paid to an author or any person who, not being the author, is the owner of the copyright and is hence competent in law to transfer the same to the Government. It is against these notifications of 1950 and 1952 that the present petition under Article 32 of the Constitution is directed and the petitioners pray for withdrawal of these notifications on the ground that they contravene the fundamental rights of the petitioners guaranteed under the Constitution.

The contentions raised by Mr. Pathak, who appeared in support of the petitioners, are of a three-fold character. It is contended in the first place that the executive Government of a State is wholly incompetent, without any legislative sanction, to engage in any trade or business activity and that the acts of the Government in carrying out their policy of establishing monopoly in the business of printing and publishing text books for school students is wholly without jurisdiction and illegal. His second contention is, that assuming that the State could create a monopoly in its favour in respect of a particular trade or business, that could be done not by any executive act but by means of a proper legislation which should conform to the requirements of Article 19 (6) of the Constitution. Lastly, it is argued that it was not open to the Government to deprive the petitioners of their interest in any business or undertaking which amounts to property without authority of law and without payment of compensation as is required under Article 31 of the Constitution.

The first point raised by Mr. Pathak, in substance, amounts to this, that the Government has no power in law to carry on the business of printing or selling text books for the use of school students in competition with private agencies without the sanction of the legislature. It is not argued that the functions of a modern State like the police States of old are confined to mere collection of taxes or maintenance of laws and protection of the realm from external or internal enemies. A modern State is certainly expected to engage in all activities necessary for the promotion of the social and economic welfare of the community. What Mr. Pathak says, however, is, that as our Constitution clearly recognises a division of governmental functions into three categories, *viz.*, the legislative, the judicial and the executive, the function of the executive cannot but be to execute the laws passed by the legislature or to supervise the enforcement of the same. The legislature must first enact a measure which the executive can then carry out. The learned counsel has, in support of this contention, placed considerable reliance upon Articles 73 and 162 of our Constitution and also upon certain decided authorities of the Australian High Court to which we shall presently refer.

Article 73 of the Constitution relates to the executive powers of the Union, while the corresponding provision in regard to the executive powers of

a State is contained in Article 162. The provisions of these Articles are analogous to those of sections 8 and 49 (2) respectively of the Government of India Act, 1935 and lay down the rule of distribution of executive powers between the Union and the States, following the same analogy as is provided in regard to the distribution of legislative powers between them. Article 162, with which we are directly concerned in this case, lays down :

"Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws :

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof".

Thus under this Article the executive authority of the State is exclusive in respect to matters enumerated in List II of Seventh Schedule. The authority also extends to the Concurrent List except as provided in the Constitution itself or in any law passed by the Parliament. Similarly, Article 73 provides that the executive powers of the Union shall extend to matters with respect to which the Parliament has power to make laws and to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or any agreement. The proviso engrafted on clause (1) further lays down that although with regard to the matters in the Concurrent List the executive authority shall be ordinarily left to the State it would be open to the Parliament to provide that in exceptional cases the executive power of the Union shall extend to these matters also. Neither of these Articles contain any definition as to what the executive function is and what activities would legitimately come within its scope. They are concerned primarily with the distribution of the executive power between the Union on the one hand and the States on the other. They do not mean, as Mr. Pathak seems to suggest, that it is only when the Parliament or the State Legislature has legislated on certain items appertaining to their respective lists, that the Union or the State executive, as the case may be, can proceed to function in respect to them. On the other hand, the language of Article 172 clearly indicates that the powers of the State executive do extend to matters upon which the State Legislature is competent to legislate and are not confined to matters over which legislation has been passed already. The same principle underlies Article 73 of the Constitution. These provisions of the Constitution therefore do not lend any support to Mr. Pathak's contention.

The Australian cases upon which reliance has been placed by the learned counsel do not, in our opinion, appear to be of much help either. In the first[1], of these cases, the executive Government of the Commonwealth, during the continuance of the war, entered into a number of agreements with a company which was engaged in the manufacture and sale of wool-tops. The agreements were of different types. By one class of agreements, the Commonwealth Government gave consent to the sale of wool-tops by the company in return for a share of the profits of the transactions (called by the parties "a licence fee"). Another class provided that the business of manufacturing wool-tops should be carried on by the company as agents for the Commonwealth in consideration of the company receiving an annual sum from the Commonwealth. The rest of the agreements were a combination of these two varieties. It was held by a Full Bench of the High Court that apart from any authority conferred by an Act of Parliament or by regulations thereunder, the executive Government of the Commonwealth had no power to make or ratify any of these agreements. The decision, it may be noticed, was based substantially upon the provision of section 61 of the Australian Constitution which is worded as follows :

"The executive power of the Commonwealth is vested in the Queen and is exercised by the Governor-General as the Queen's representative and extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth".

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1. *The Commonwealth and the Central Wool Committee* v. *The Colonial Combing, Spinning and Weaving Co., Ltd.*, 31 C.L.R. 421.

In addition to this, the King could assign other functions and powers to the Governor-General under section 2 but in this particular case no assignment of any additional powers was alleged or proved. The Court held that the agreements were not directly authorised by the Parliament or under the provisions of any statute and as they were not for the execution and maintenance of the Constitution they must be held to be void. Isacs, J., in his judgment, dealt elaborately with the two types of agreements and held that the agreements, so far as they purported to bind the company to pay to the Government money, as the price of consents, amounted to the imposition of a tax and were void without the authority of Parliament. The other kind of agreements which purported to bind the Government to pay to the company a remuneration for manufacturing wool-tops was held to be an appropriation of public revenue and being without legislative authority was also void.

It will be apparent that none of the principles indicated above could have any application to the circumstances of the present case. There is no provision in our Constitution corresponding to section 61 of the Australian Act. The Government has not imposed anything like taxation or licence fee in the present case nor have we been told that the appropriation of public revenue involved in the so-called business in text books carried on by the Government has not been sanctioned by the legislature by proper Appropriation Acts.

The other case[1], is of an altogether different character and arose in the following way. The Commonwealth Government had established a clothing factory in Melbourne for the purpose of making naval and military uniforms for the defence forces and postal employees. In times of peace the operations of the factory included the supply of uniforms for other departments of the Commonwealth and for employees in various public utility services. The Governor-General deemed such peace-time operations of the factory necessary for the efficient defence of the Commonwealth inasmuch as the maintenance intact of the trained complement of the factory would assist in meeting war-time demands. A question arose as to whether operations of the factory for such purposes in peace-time were authorised by the Defence Act. The majority of the Court answered the question in the affirmative. Starke, J., delivered a dissenting opinion upon which Mr. Pathak mainly relied. The learned Judge laid stress on section 61 of the Constitution Act according to which the executive power of the Commonwealth extended to the maintenance of the Constitution and of the laws of the Commonwealth and held that there was nothing in the Constitution or any law of the Commonwealth which enabled the Commonwealth to establish and maintain clothing factories for other than Commonwealth purposes. The opinion, whether right or wrong, turns upon the particular facts of the case and upon the provision of section 61 of the Australian Act and it cannot and does not throw any light on the question that requires decision in the present case.

A question very similar to that in the present case did arise for consideration before a Full Bench of the Allahabad High Court in *Motilal* v. *The Government of the State of Uttar Pradesh*[2]. The point canvassed there was whether the Government of a State has power under the Constitution to carry on the trade or business of running a bus service in the absence of a legislative enactment authorising the State Government to do so. Different views were expressed by different Judges on this question. Chief Justice Malik was of opinion that in a written Constitution like ours the executive power may be such as is given to the executive or is implied, ancillary or inherent. It must include all powers that may be needed to carry into effect the aims and objects of the Constitution. It must mean more than merely executing the laws. According to the Chief Justice the State has a right to hold and manage its own property and carry on such trade or business as a citizen has the right to carry on, so long as such activity does not encroach

1. *Vide Attorney-General for Victoria* v. *The Commonwealth*, 52 C.L.R. 533.

2. I.L.R. (1951) 1 All. 269 : A.I.R. 1951 All. 257 (F.B.).

upon the rights of others or is not contrary to law. The running of a transport business therefore was not *per se* outside the ambit of the executive authority of the State. Sapru, J., held that the power to run a Government bus service was incidental to the power of acquiring property which was expressly conferred by Article 298 of the Constitution. Mootham and Wanchoo, JJ., who delivered a common judgment, were also of the opinion that there was no need for a specific legislative enactment to enable a State Government to run a bus service. In the opinion of these learned Judges an act would be within the executive power of the State if it is not an act which has been assigned by the Constitution of India to other authorities or bodies and is not contrary to the provisions of any law and does not encroach upon the legal rights of any member of the public. Agarwala, J., dissented from the majority view and held that the State Government had no power to run a bus service in the absence of an Act of the legislature authorising the State to do so. The opinion of Agarwala, J., undoubtedly supports the contention of Mr. Pathak but it appears to us to be too narrow and unsupportable.

It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away. The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature. It can also, when so empowered, exercise judicial functions in a limited way. The executive Government, however, can never go against the provisions of the Constitution or of any law. This is clear from the provisions of Article 154 of the Constitution but, as we have already stated, it does not follow from this that in order to enable the executive to function there must be a law already in existence and that the powers of the executive are limited merely to the carrying out of these laws.

The limits within which the executive Government can function under the Indian Constitution can be ascertained without much difficulty by reference to the form of the executive which our Constitution has set up. Our Constitution though federal in its structure, is modelled on the British Parliamentary system where the executive is deemed to have the primary responsibility for the formulation of governmental policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State. The executive function comprises both the determination of the policy as well as carrying it into execution. This evidently includes, the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact, the carrying on or supervision of the general administration of the State.

In India, as in England, the executive has to act subject to the control of the legislature ; but in what way is this control exercised by the legislature? Under Article 53 (1) of our Constitution, the executive power of the Union is vested in the President but under Article 75 there is to be a council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. The President has thus been made a formal or constitutional head of the executive and the real executive powers are vested in the Ministers or the Cabinet. The same provisions obtain in regard to the Government of States ; the Governor or the Rajpramukh, as the case may be, occupies the position of the head of the executive in the State but it is virtually the council of Ministers in each State that carries on the executive Government. In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England and the council of Ministers consisting, as it does, of the members of the legislature is,

like the British Cabinet, "a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part". The Cabinet enjoying, as it does, a majority in the legislature concentrates in itself the virtual control of both legislative and executive functions; and as the Ministers constituting the Cabinet are presumably agreed on fundamentals and act on the principle of collective responsibility, the most important questions of policy are all formulated by them.

Suppose now that the Ministry or the executive Government of a State formulates a particular policy in furtherance of which they want to start a trade or business. Is it necessary that there must be a specific legislation legalising such trade activities before they could be embarked upon? We cannot say that such legislation is always necessary. If the trade or business involves expenditure of funds, it is certainly required that Parliament should authorise such expenditure either directly or under the provisions of a statute. What is generally done in such cases is, that the sums required for carrying on the business are entered in the annual financial statement which the Ministry has to lay before the House or Houses of Legislature in respect of every financial year under Article 202 of the Constitution. So much of the estimates as relate to expenditure other than those charged on the consolidated fund are submitted in the form of demands for grants to the legislature and the legislature has the power to assent or refuse to assent to any such demand or assent to a demand subject to reduction of the amount (Article 203). After the grant is sanctioned, an Appropriation Bill is introduced to provide for the appropriation out of the consolidated fund of the State of all moneys required to meet the grants thus made by the Assembly (Article 204). As soon as the Appropriation Act is passed, the expenditure made under the heads covered by it would be deemed to be properly authorised by law under Article 266 (3) of the Constitution.

It may be, as Mr. Pathak contends, that the Appropriation Acts are no substitute for specific legislation and that they validate only the expenses out of the consolidated funds for the particular years for which they are passed; but nothing more than that may be necessary for carrying on of the trade or business. Under Article 266 (3) of the Constitution no moneys out of the consolidated funds of India or the consolidated fund of a State shall be appropriated except in accordance with law and for the purposes and in the manner provided in this Constitution. The expression "law" here obviously includes the Appropriation Acts. It is true that the Appropriation Acts cannot be said to give a direct legislative sanction to the trade activities themselves. But so long as the trade activities are carried on in pursuance of the policy which the executive Government has formulated with the tacit support of the majority in the legislature, no objection on the score of their not being sanctioned by specific legislative provision can possibly be raised. Objections could be raised only in regard to the expenditure of public funds for carrying on of the trade or business and to these the Appropriation Acts would afford a complete answer.

Specific legislation may indeed be necessary if the Government require certain powers in addition to what they possess under ordinary law in order to carry on the particular trade or business. Thus when it is necessary to encroach upon private rights in order to enable the Government to carry on their business, a specific legislation sanctioning such course would have to be passed.

In the present case it is not disputed that the entire expenses necesssary for carrying on the business of printing and publishing the text books for recognised schools in Punjab were estimated and shown in the annual financial statement and that the demands for grants, which were made under different heads, were sanctioned by the State Legislature and due Appropriation Acts were passed. For the purpose of carrying on the business the Government do not require any additional powers and whatever is necessary for their purpose, they can have by entering into contracts with authors and other people. This power of contract is expressly vested in the Government under Article 298 of the Constitution.

In these circumstances, we are unable to agree with Mr. Pathak that the carrying on of the business of printing and publishing text books was beyond the competence of the executive Government without a specific legislation sanctioning such course.

These discussions however are to some extent academic and are not sufficient by themselves to dispose of the petitioners' case. As we have said already, the executive Government are bound to conform not only to the law of the land but also to the provisions of the Constitution. The Indian Constitution is a written Constitution and even the legislature cannot override the fundamental rights guaranteed by it to the citizens. Consequently, even if the acts of the executive are deemed to be sanctioned by the legislature, yet they can be declared to be void and inoperative if they infringe any of the fundamental rights of the petitioners guaranteed under Part III of the Constitution. On the other hand, even if the acts of the executive are illegal in the sense that they are not warranted by law, but no fundamental rights of the petitioners have been infringed thereby, the latter would obviously have no right to complain under Article 32 of the Constitution though they may have remedies elsewhere if other heads of rights are infringed. The material question for consideration therefore is : What fundamental rights of the petitioners, if any, have been violated by the notifications and acts of the executive Government of Punjab undertaken by them in furtherance of their policy of nationalisation of the text books for the school students?

The petitioners claim fundamental right under Article 19 (1) (*g*) of the Constitution which guarantees, *inter alia*, to all persons the right to carry on any trade or business. The business which the petitioners have been carrying on is that of printing and publishing books for sale including text books used in the primary and middle classes of the schools in the Punjab. Ordinarily it is for the school authorities to prescribe the text books that are to be used by the students and if these text books are available in the market the pupils can purchase them from any book-seller they like. There is no fundamental right in the publishers that any of the books printed and published by them should be prescribed as text books by the school authorities or if they are once accepted as text books they cannot be stopped or discontinued in future. With regard to the schools which are recognised by the Government the position of the publishers is still worse. The recognised schools receive aids of various kinds from the Government including grants for the maintenance of the institutions, for equipment, furniture, scholarships and other things and the pupils of the recognised schools are admitted to the School Final Examinations at lower rates of fees than those demanded from the students of non-recognised schools. Under the school code, one of the main conditions upon which recognition is granted by Government is that the school authorities must use as text books only those which are prescribed or authorised by the Government. So far therefore as the recognised schools are concerned—and we are concerned only with these schools in the present case—the choice of text books rests entirely with the Government and it is for the Government to decide in which way the selection of these text books is to be made. The procedure hitherto followed was that the Government used to invite publishers and authors to submit their books for examination and approval by the Education Department and after selection was made by the Government, the size, contents as well as the prices of the books were fixed and it was left to the publishers or authors to print and publish them and offer them for sale to the pupils. So long as this system was in vogue the only right which publishers, like the petitioners had, was to offer their books for inspection and approval by the Government. They had no right to insist on any of their books being accepted as text books. So the utmost that could be said is that there was merely a chance or prospect of any or some of their books being approved as text books by the Government. Such chances are incidental to all trades and businesses and there is no fundamental right guaranteeing them. A trader might be lucky in securing a particular market for his goods but if he loses that field because the particular customers for some reason or other do not choose to buy goods from him, it is not open to him to say that it was his fundamental right

to have his old customers for ever. On the one hand, therefore, there was nothing but a chance or prospect which the publishers had of having their books approved by the Government, on the other hand the Government had the undisputed right to adopt any method of selection they liked and if they ultimately decided that after approving the text books they would purchase the copyright in them from the authors and others provided the latter were willing to transfer the same to the Government on certain terms, we fail to see what right of the publishers to carry on their trade or business is affected by it. Nobody is taking away the publishers' right to print and publish any books they like and to offer them for sale but if they have no right that their books should be approved as text books by the Government it is immaterial so far as they are concerned whether the Government approves of text books submitted by other persons who are willing to sell their copy rights in the books to them, or choose to engage authors for the purpose of preparing the text books which they take up on themselves to print and publish. We are unable to appreciate the argument of Mr. Pathak that the Government while exercising their undoubted right of approval cannot attach to it a condition which has no bearing on the purpose for which the approval is made. We fail to see how the petitioners' position is in any way improved thereby. The action of the Government may be good or bad. It may be criticised and condemned in the Houses of the Legislature or outside but this does not amount to an infraction of the fundamental right guaranteed by Article 19 (1) (*g*) of the Constitution.

As in our view the petitioners have no fundamental right in the present case which can be said to have been infringed by the action of the Government, the petition is bound to fail on that ground. This being the position, the other two points raised by Mr. Pathak do not require consideration at all. As the petitioners have no fundamental right under Article 19 (1) (*g*) of the Constitution, the question whether the Government could establish a monopoly without any legislation under Article 19 (6) of the Constitution is altogether immaterial. Again a mere chance or prospect of having particular customers cannot be said to be a right to property or to any interest in an undertaking within the meaning of Article 31 (2) of the Constitution and no question of payment of compensation can arise because the petitioners have been deprived of the same. The result is that the petition is dismissed with costs.

Petition dismissed.

PETITIONS NOS. 71 TO 77 AND 85 OF 1955.

The Judgment of the Court was delivered by

Mukherjea, C.J.—These 8 petitions under Article 32 of the Constitution raise identically the same points for consideration as are involved in Petition No. 652 of 1954 just disposed of. The petitioners in these cases also purport to be printers, publishers and sellers of text books for various classes in the schools of Punjab and they complain of infraction of their fundamental rights under Article 19 (1) (*g*) of the Constitution by reason of the various notifications issued by the State of Punjab in pursuance of their policy of nationalisation of text books. The learned counsel appearing in these cases have adopted in their entirety the arguments that have been advanced by Mr. Pathak in Petition No. 652 of 1954 and no fresh or additional argument has been put forward by any one of them. This being the position the decision in Petition No. 652 of 1954 will govern these petitions also and they will stand dismissed but we would make no order as to costs.

G.R./K.S. *Petitions dismissed.*

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT:—S. R. DAS, N. H. BHAGWATI AND BHUVANESWAR PRASAD SINHA, JJ.

M. K. Ranganathan and another .. *Appellants**

v.

The Government of Madras and others .. *Respondents.*

Companies Act (VII of 1913), section 232 (1) (as amended by Act XXII of 1936)—Scope—Sale by receiver appointed by trustees for debenture-holders of properties without leave of the winding up Court—Validity.

The words "any sale held without the leave of the Court of any of the properties" were inserted in section 232 (1) of the Companies Act, 1913, by Act XXII of 1936. Having regard to the context in which these words have been used in juxtaposition with "any attachment, distress or execution put into force without leave of the Court against the estate or effects" it would be a legitimate construction to be put upon them that they refer only to sales held through the intervention of the Court and not to sales effected by the secured creditor outside the winding up and without the intervention of the Court. *Case-law discussed.*

Accordingly a sale held by the receiver appointed by the trustees of the debenture-holders of a company is valid and effectual to convey title to the purchaser. Such a sale is binding on all the parties concerned and cannot be challenged on the ground of absence of leave of the winding up Court.

Appeal from the Judgment† and Order, dated the 29th day of September, 1954, of the High Court of Judicature at Madras in Original Side Appeal No. 113 of 1954, arising out of the order, dated the 9th day of August, 1954, of the said High Court in its Ordinary Original Civil Jurisdiction in Application No. 3542 of 1954.

C. K. Daphtary, Solicitor-General for India (*H. J. Umrigar, Mohan Kumaramangalam* and *Rajinder Narain,* Advocates, with him), for Appellants.

R. H. Dhebar and *P. G. Gokhale,* Advocates, for Respondent No. 1.

Samarandra Nath Mukherjee and *B. N. Ghose,* Advocates for Respondent No. 2.

N. P. Engineer, Senior Advocate (*B. Moropant and V. J. Taraporewal,* Advocates, with him), for Respondent No. 3.

The Judgment of the Court was delivered by

Bhagwati, J.—This appeal with a certificate under Article 133 (1) (*c*) of the Constitution is directed against the judgment of the High Court of Judicature at Madras dismissing the appeal of the appellants and refusing to set aside a sale effected by Respondent 2 of certain properties belonging to the Madras Electric Tramways (1904), Ltd., hereinafter called the Company, above the ground at Vepery, Madras and Mylapore, including the machinery, cars, etc., and buildings as scrap to Respondent 3 in his capacity as the Receiver of the trustees of the debenture-holders of the Company.

The Appellants are the Secretary and President respectively of the Madras Tramways Workers Association (Regd. No. 1253) a Trade Union registered under the Trade Unions Act. The workmen employed by the Company are entitled under the award of the Special Industrial Tribunal, Madras, in I. D. No. 9 of 1953 published in the *Fort St. George Gasette,* dated the 8th July, 1953, being G.O. Ms. No. 3024|53 to a payment of nearly Rs. 7,00,000 out of which

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* Civil Appeal No. 20 of 1955. 20th April, 1955.
† (1955) 2 M.L.J. 1.

the workers belonging to the Madras Tramways Workers Association alone would be entitled nearly to a sum of Rs. 4,35,000 and are thus the major creditors of the Company. The Company was incorporated in England with its principal office situated at No. 1, Rundall's Road, Vepery, Madras-7 and was running the Tramway Service in Madras with licence issued to it by the Government under the Tramways Act. It had issued 1300 First Debentures of £100 each and the debenture-holders had appointed the Beawer Trust, Ltd., England, as trustees. By an Indenture made in England on the 13th October, 1924, the Company charged by way of first charge in favour of the trustees all its undertaking properties and assets for the time being both present and future including its uncalled capital with the payment of all moneys for the time being owing on the security of the debentures and such charge was to rank as a floating charge. By two subsequent deeds made at Madras, dated the 26th March, 1925, and 6th July, 1950, certain immovable properties belonging to the company were mortgaged in favour of the said trustees. The said trustees appointed Respondent 2, the Managing Director of the Company in day to day management of the Tramway Service and of the business of the Company, as their Receiver. He took possession as such Receiver, from the midnight of 11th April, 1953, of all the assets of the Company including moneys in the bank to the credit of the Company and after that date the Tramways Service was suspended and still remains suspended.

One J. B. Beardsell, one of the Directors of the Company filed O.P. No. 419 of 1953 as the duly constituted Attorney of the Company for winding up the Company on the ground that it was unable to pay its debts and that it had ceased to carry on its business. An order for winding up of the Company was made by the Court on the 20th January, 1954, and the Official Receiver, High Court, Madras, was appointed the Official Liquidator. Since all the assets including the moneys of the Company were in possession of Respondent 2, the Official Receiver was unable to take charge of anything except the records of the company.

Soon after the order for winding up the Respondent 2 advertised in the newspapers on the 23rd January, 1954, for the sale of the properties and assets of the Company. At the end of the conditions of sale he stated in Paragraph 7 that:

> "the sales are for the time being subject to the approval of the High Court at Madras and it will be for the undersigned to obtain such approval for accepted offers free of all costs to the purchaser".

At the time of the order of winding up, two suits were pending in the High Court, C.S. No. 191 of 1952 filed by the Company against the State of Madras for Rs. 1,33,204-9-0 and interest thereon being electric charges alleged to have been collected by the State of Madras in excess of those payable by the Company and paid by the Company under protest and C.S. No. 368 of 1953 filed by the State of Madras against the Company for the recovery of Rs. 9,26,123-2-3 with interest thereon, being the difference alleged to be due in respect of the electric charges under the old rates and the revised rates applicable to the Company During the pendency of the said suits Respondent 2 gave an undertaking in Application No. 4533 of 1953 in Civil Suit No. 368 of 1953 that he would not without the orders of the High Court dispose of any of the assets of the Company which were in his possession till the disposal of the suit C.S. No. 368 of 1953. The two suits aforesaid were tried together and were disposed of by a common judgment on the 16th March, 1954.

On the 16th July, 1954, Respondent 2 agreed to sell and Respondent 3 agreed to buy the movable properties of the Company the particulars of which were set out in the agreement entered into on that date, for a price of Rs. 4,01,658 of which half was paid on the signing of the agreement and the other half was

agreed to be paid out of the proceeds of sale to be made by the purchasers of the assets as scrap.

On the 23rd July, 1954, the Official Receiver, High Court, Madras (Respondent 5 herein) filed an application No. 3542 of 1954 for setting aside the said sale of the assets of the Company on the grounds, *inter alia,* that it was prejudicial to the interests of the general body of unsecured creditors, that the same had been concluded with undue haste and without adequate publicity and in violation of Respondent 2's said undertaking to the Court. It also asked for an injunction restraining the Respondent 2 from handing over and the Respondent 3 from either taking over or breaking up the assets purchased by him pending the disposal of the said application.

This application was based on a report of the Official Receiver in which after setting out the relevant facts he submitted that even though under section 229 of the Indian Companies Act the Company which was admittedly insolvent was governed by rules prevailing with regard to the respective rights of the secured and unsecured creditors and to debts provable and valuation of annuities governing the administration in insolvency and secured creditors generally stood outside the liquidation and were entitled to have the remedy of realising the security and proving before him for the deficiency, if the properties of the Company could be sold for a price higher than the amount due to the Trustees of the debenture-holders there was a possibility of a surplus coming into his hands for the benefit of the unsecured creditors. If the Respondent 2 proved before him for any deficiency due to the secured creditors, it would certainly affect the rights of unsecured creditors, and moreover though the secured creditors might realise the security, it will be in the interests of the unsecured creditors to see that a fair and proper price was obtained. He therefore submitted that in the interests of the unsecured creditors it was just and necessary to have a fair valuation ascertained and an enquiry held to ascertain whether the sale by the Respondent 2 in favour of Respondent 3 was *bona fide* and for a proper price. Respondent 2 filed an affidavit in reply in August, 1954, contending *inter alia,* (1) that the offer by the Respondent 3 was the highest, that he had received and that this had been accepted *bona fide,* (2) that in the advertisement the condition as to the previous sanction of the Court was inserted because of the undertaking that he had given to the Court in C.S. No. 368 of 1953 and that this undertaking lapsed with the dismissal of the said suit on the 16th March, 1954, (3) that he had been advised by the Solicitors in England for the debenture trustees that it was unnecessary for him to obtain the sanction of the Court and that he had been instructed not to apply for such sanction and (4) that the sale was *bona fide* and he had secured as good a price as could be obtained.

By its Judgment and Order, dated the 9th August, 1954, Mr. Justice Balakrishna Ayyar (in Chambers) dismissed the said application with costs. The learned Judge held that the question whether Respondent 2 had violated the undertaking given by him was not germane to the application before him, that undoubtedly the Respondent 2 did give wide publicity of his intention to sell the assets of the Company, that it could not be said that the sale was *sub rosa* on the ground of want of wide publicity to the intended sale of the Company's assets and that the Respondent 3's offer was the best offer received by the Respondent 2 looking both to the abstract of offers appended to the affidavit of the Respondent 2 in the said application, and looking to the other offers pointed out to him by Respondent 5. The learned Judge further referred to the offer of the Corporation of Madras and said that the said Corporation had not made any firm offer at all and that the offer of one A. Chettiar of Rs. 4,25,000 made on 5th August, 1954, during the hearing of the application was an offer made by a person who did not appear to him to be a man of sound financial status. The

learned Judge in his judgment also recorded the fact that during the hearing of the application the Respondent 3 offered to sell to the Madras Municipal Corporation the entire assets he had purchased at the same price which he paid for it but the Corporation were not prepared to accept the offer.

The Respondent 5 accepted the said judgment and decision and did not prefer any appeal against the same. But the Appellants who were not parties to the proceedings applied for and obtained from the High Court leave to appeal from the said decision. This appeal also was dismissed by the High Court with costs on the 24th September, 1954. The High Court differed from the finding of the trial Court and held that due publicity had not been given to the intended sale and observed that if the matter rested merely on a decision of that point they would have allowed the appeal and set aside the sale. They however held that in the absence of fraud or want of *bona fides* on the part of the seller along with that of the buyer the sale in favour of the Respondent 3 could not be set aside. The High Court further considered the question whether the said sale was void as being without the leave of the Court in view of section 232 of the Indian Companies Act and answered that question in the negative. The High Court further held that a secured creditor had a right to realise his security without seeking the assistance of the Court and remaining outside the winding up.

Being aggrieved by the said Judgment and Decree of the High Court the Appellants applied for leave to appeal to this Court and such leave was granted by the High Court on the 24th September, 1954.

The *bona fides* of the Respondent 2 in the matter of the sale were not challenged either in the Courts below or before us and there were concurrent findings of fact that the price obtained by Respondent 2 was the best price available under the circumstances. It was however urged by the learned Solicitor-General for the appellants:—(1) that the High Court, having found that due publicity had not been given to the intended sale, ought not to have allowed the Respondent 3 at that stage to raise the question as to whether the Court had any power or jurisdiction to set aside the sale except on the ground that it was vitiated by fraud or for want of *bona fides* and (2) that the sale by Respondent 2 being a sale held without leave of the winding up Court was void under section 232 (1) of the Indian Companies Act. The High Court had allowed the Respondent 3 to raise the question even at that late stage inasmuch as it was a pure question of law and the learned Solicitor-General therefore rightly did not press the first contention before us. The main argument centered round the second contention, *viz.*, whether the sale effected by the Respondent 2 without leave of the winding up Court was void and hence liable to be set aside.

The decision of this question turns upon the true construction of section 232 of the Indian Companies Act, which runs as under:—

> "(1) Where any company is being wound up by or subject to the supervision of the Court, any attachment, distress or execution put in force without leave of the Court against the estate or effects *or any sale held without leave of the Court of any of the properties* of the company after the commencement of the winding up shall be void.
>
> (2) Nothing in this section applies to proceedings by the Government".

It may be noted that the words "or any sale held without leave of the Court of any of the properties" italicised above were inserted by Act XXII of 1936. Before this amendment section 232 (1) was almost in identical terms with section 228 (1) of the English Companies Act of 1948.

Two other sections of the Indian Companies Act may be noted in this context, *viz.*, section 171:—

"When a winding up order has been made or a provisional liquidator has been appointed no suit or other legal proceeding shall be proceeded with or commenced against the company except by leave of the Court, and subject to such terms as the Court may impose;"

and section 229:—

"In the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent; and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up, and make such claims against the company as they respectively are entitled to by virtue of this section;"

which correspond respectively with sections 231 and 317 of the English Companies Act of 1948.

The position of a secured creditor in the winding up of a company has been thus stated by Lord Wrenbury in *Food Controller* v. *Cork*:[1]

"The phrase 'outside the winding up' is an intelligible phrase if used, as it often is, with reference to a secured creditor, say a mortgagee. The mortgagee of a company in liquidation is in a position to say "the mortgaged property is to the extent of the mortgage my property. It is immaterial to me whether my mortgage is an winding up or not. I remain outside the 'winding up' and shall enforce my rights as mortgagee". This is to be contrasted with the case in which such a creditor prefers to assert his right, not as a mortgagee, but as a creditor. He may say 'I will prove in respect of my debt'. If so, he comes into the winding up".

It is also summarised in Palmer's Company Precedents, Vol. II, page 415:

"Sometimes the mortgagee sells, with or without the concurrence of the liquidator, in exercise of a power of sale vested in him by the mortgage. It is not necessary to obtain liberty to exercise the power of sale, although orders giving such liberty have sometimes been made".

The secured creditor is thus outside the winding up and can realise his security without the leave of the winding up Court, though if he files a suit or takes other legal proceedings for the realisation of his security he is bound under section 231 (corresponding with section 171 of the Indian Companies Act) to obtain the leave of the winding up Court before he can do so although such leave would almost automatically be granted. Section 231 has been read together with section 228 (1) and the attachment, sequestration, distress or execution referred to in the latter have reference to proceedings taken through the Court and if the creditor has resort to those proceedings he cannot put them in force against the estate or effects of the Company after the commencement of the winding up without the leave of the winding up Court. The provisions in section 317 are also supplementary to the provisions of section 231 and emphasise the position of the secured creditor as one outside the winding up, the secured creditor being, in regard to the exercise of those rights and privileges, in the same position as he would be under the Bankruptcy Act.

The corresponding provisions of the Indian Companies Act have been almost bodily incorporated from those of the English Companies Act and if there was nothing more, the position of the secured creditor here also would be the same as that obtaining in England and he would also be outside the winding up and a sale by him without the intervention of the Court would be valid and could not be challenged as void under section 232 (1) of the Indian Companies Act.

It was however urged that the addition of the words "or any sale held without leave of the Court of any of the properties" had changed the position of the secured creditor and even though the secured creditor realised the security without the intervention of the Court such sale, if effected by him without the leave of the winding up Court, was void. It was pointed out that these words

1. L.R. (1923) A.C. 647.

did not find their place in the corresponding section 228 (1) of the English Companies Act and therefore even though any attachment, distress or execution put in force without leave of the Court against the estate or effects of the company after the commencement of the winding up was void under the terms of the section 232 (1) as it originally stood, the words "or any sale held without leave of the Court of any of the properties" of the company were wide enough to include not only a sale held through the intervention of the Court but also a sale effected by the secured creditor without the intervention of the Court whether the sale was by private treaty or by public auction. It was contended on the other hand on behalf of the contesting Respondent, Respondent 3, that the amendment was made in order to get over the decision of the Allahabad High Court in *Kayasth Trading and Banking Corporation, Ltd.* v. *Sat Narain Singh*[1] and that in any event on a true construction of section 232 (1) as amended the words "any sale held" had reference in the context only to sales held by or effected through the intervention of the Court and not sales effected by the secured creditor without the intervention of the Court.

The decision of the Allahabad High Court above referred to had held on a construction of section 232 (1) as it then stood, that an execution was not put in force merely when the property of the judgment-debtor was sold in pursuance thereof, but it was put in force when the property was attached and hence where the property of an insolvent company was attached prior to the date of the commencement of the winding up but was actually sold subsequent to such date, the sale was not void and could be upheld. There was an earlier decision of the Patna High Court in *Baldeo Narain Singh* v. *The United India Bank, Ltd.*[2] in which a contrary decision had been reached exactly under similar circumstances. It is well-known that this conflict was resolved and the decision of the Allahabad High Court was got over by inserting this amendment by Act XXII of 1936.

The statement of objects and reasons is certainly not admissible as an aid to the construction of a statute. But it can be referred to for the limited purpose of ascertaining the conditions prevailing at the time which actuated the sponsor of the Bill to introduce the same and the extent and urgency of the evil which he sought to remedy. (*State of West Bengal* v. *Subodh Gopal Bose and others*).[3] The amendment of section 232 (1) inserted by Act XXII of 1936 was designed to prevent such sales as were upheld by the decision of the Allahabad High Court in *Kayasth Trading and Banking Corporation, Ltd.* v. *Sat Narayan Singh*[1] and it would be permissible to refer to that portion of the statement of objects and reasons for the purpose of ascertaining the extent and urgency of the evil which was sought to be remedied by introducing the amendment. It follows therefore that the amendment could not have been intended to bring within the sweep of the general words "or any sale held without the leave of the Court of any of the properties" sales effected by the secured creditor outside the winding up.

Even apart from this intendment there are certain canons of construction which also tend to support the same conclusion. Prior to the amendment the law was well-settled both in England and in India that the secured creditor was outside the winding up and he could realise his security without the intervention of the Court by effecting a sale of the mortgaged premises by private treaty or by public auction. It was only when the intervention of the Court was sought either by putting in force any attachment, distress or execution within the meaning of section 232 (1) as it stood before the amendment or proceeding with or commencing a suit or other legal proceedings against the company within the

1. (1921) I.L.R. 43 All. 433.
2. (1916) 38 I.C. 91.
3. 1954 S.C.R. 587 at p. 628: 1954 S.C.J. 127: (1954) 1 M.L.J. 314 (S.C.).

meaning of section 171 that leave of the Court was necessary and if no such leave was obtained the remedy could not be availed of by the secured creditor. The sale of the mortgaged premises was also brought by the amendment on a par with the attachment, distress or execution put in force at the instance of the secured creditor and having regard to the context such sale could only be construed to be a sale held through the intervention of the Court and not one effected by the secured creditor outside the winding up and without the intervention of the Court.

It is a well-recognised rule of the construction that "when two or more words which are susceptible of analogous meaning are coupled together *noscitur a sociis*. They are understood to be used in their cognate sense. They take, as it were, their colour from each other, that is, the more general is restricted to a sense analogous to the less general". (Maxwell on Interpretation of Statutes—Tenth Edition, p. 332). The Judicial Committee of the Privy Council also expressed itself in similar terms in *Angus Robertson & others* v. *George Day*[1] :—

"It is a legitimate rule of construction to construe words in an Act of Parliament with reference to words found in immediate connection with them".

Having regard therefore to the context in which these words "any sale held without leave of the Court of any of the properties" have been used in juxtaposition with "any attachment, distress or execution put into force without leave of the Court against the estate or effects" it would be a legitimate construction to be put upon them that they refer only to sales held through the intervention of the Court and not to sales effected by the secured creditor outside the winding up and without the intervention of the Court.

There is also a presumption against implicit alteration of law and that is enunciated by Maxwell on Interpretation of Statutes—10th Edition, at page 81 in the following terms:—

"One of these presumptions is that the legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implication, or, in other words, beyond the immediate scope and object of the statutes. In all general matters outside those limits the law remains undisturbed. It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness. . . ."

This passage from Maxwell was approved of by Their Lordships of the Privy Council in *Murugian, P.* v. *Jainudeen, C. L.*[2] and Their Lordships agreed that the law was correctly stated in the passage just cited. To the same effect are also the observations of the Court of Appeal in *National Assistance Board* v. *Wilkinson*[3] where it was held that the Statute is not to be taken as affecting a fundamental alteration in the general law unless it uses words pointing unmistakably to that conclusion. In that case at page 658 Lord Goddard, C. J., observed :—

"But it may be presumed that the legislature does not intend to make a substantial alteration in the law beyond what it expressly declares. In *Minet* v. *Leman*,[4] Sir John Romilly, M. R., stated as a principle of construction which could not be disputed that 'the general words of the Act are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be applied to those words consistently with the intention of preserving the existing policy untouched".

If the construction sought to be put upon the words "or any sale held without leave of the Court of any of the properties" by the Appellants were accepted it would effect a fundamental alteration in the law as it stood before the amendment was inserted in section 232 (1) by Act XXII of 1936. Whereas

1. (1879) L.R. 5 App. Cas. 63 at p. 69.
2. [1954] 3 W.L.R. 682 at p. 687.
3. L.R. [1952] 2 Q.B. 648.
4. [1855] 20 Beav. 269: 52 E.R. 606.

before the amendment the secured creditor stood outside the winding up and could if the mortgage deed so provided, realise his security without the intervention of the Court by effecting a sale either by private treaty or by public auction, no such sale could be effected by him after the amendment and that was certainly a fundamental alteration in the law which could not be effected unless one found words used which pointed unmistakably to that conclusion or unless such intention was expressed with irresistible clearness. Having regard to the circumstances under which the amendment was inserted in section 232 (1) by Act XXII of 1936 and also having regard to the context we are not prepared to hold that the Legislature in inserting that amendment intended to effect a fundamental alteration in law with irresistible clearness. Such a great and sudden change of policy could not be attributed to the Legislature and it would be legitimate therefore to adopt the narrower interpretation of those words of the amendment rather than an interpretation which would have the contrary effect. (*Vide* the Observations of the Privy Council in *Vasudeva Mudaliar and others* v. *Srinivasa Pillai and another.*)[1]

It may be observed in this connection that section 171 enacts a general provision with regard to suits or other legal proceedings to be proceeded with or commenced against the company after a winding up order has been made and lays down that no suit or other legal proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court may impose. This general provision is supplemented by the supplemental provisions to be found respectively in sections 229 and 232 (1) of the Act. Section 229 speaks of the application of insolvency rules in winding up of insolvent companies and section 232 (1) speaks of the avoidance of certain attachments, executions, etc., put into force without the leave of the Court against the estate or effects of the company and also of any sale held without the leave of the Court of any of the properties of the company after the commencement of the winding up. Section 229 recognises the position of the secured creditor generally as outside the winding up but enables him in the event of his desiring to take the benefit of the winding up proceedings to prove his debt, to value the same and share in the distribution *pro rata* of the assets of the company just in the same way as he would be able to do in the case of insolvency under the Presidency Towns Insolvency Act or the Provincial Insolvency Act. Section 232 (1) also has reference to legal proceedings in much the same way as legal proceedings envisaged by section 171 of the Act and the attachment, distress or execution put in force or the sale held are all of them legal proceedings which can only be resorted to through the intervention of the Court. The word "held" in connection with the sales contemplated within the terms of the amended section also lends support to this conclusion and this conclusion is further fortified by the terms of section 232 (2) which says that nothing in this section applies to proceedings by the Government, thus in effect indicating that what are referred to in section 232 (1) are proceedings within the meaning of that term as used in section 171 of the Act.

The Federal Court also put a similar construction on the provisions of section 171 read with section 232 (1) of the Act in *The Governor-General in Council* v. *Shiromani Sugar Mills, Ltd. (In Liquidation)*[2]:—

"Section 171 must, in our judgment, be construed with reference to other sections of the Act and the general scheme of administration of the assets of a company in liquidation laid down by the Act. In particular, we would refer to section 232. Section 232 appears to us to be supplementary to section 171 by providing that any creditor (other

1. (1907) I.L.R. 30 Mad. 426 at p. 433: L.R. 34 I.A. 186: 17 M.L.J. 444 (P.C.).

2. 1946 F.C.R. 40 at p. 55: 1946 F.L.J. 29: (1946) 1 M.L.J. 415 (F.C.).

than Government)' who goes ahead, notwithstanding a winding-up order or in ignorance of it, with any attachment, distress, execution or sale, without the previous leave of the Court, will find that such steps are void. The reference to "distress" indicates that leave of the Court is required for more than the initiation of original proceedings in the nature of a suit in an ordinary Court of law. Moreover, the scheme of the application of the company's property in the *pari passu* satisfaction of its liabilities, envisaged in section 211 and other sections of the Act, cannot be made to work in co-ordination, unless all creditors (except such secured creditors as are "outside the winding-up" in the sense indicated by Lord Wrenbury in his speech in *Food Controller* v. *Cork*[1] at page 671) are subjected as to their actions against the property of the company to the control of the Court. Accordingly, in our judgment, no narrow construction should be placed upon the words "or other legal proceeding" in section 171. In our judgment, the words can and should be held to cover distress and execution proceedings in the ordinary Courts. In our view, such proceedings are other legal proceedings against the company, as contrasted with ordinary suits against the company".

We are therefore of the opinion that the sale effected by Respondent 2 as the Receiver of the Trustees of the debenture-holders on the 16th July, 1954 was valid and binding on all parties concerned and could not be challenged as it was sought to be done by the Official Receiver. The position was rightly summed up by the High Court as under:—

"We thus reach the position that no leave of Court was needed before the Receiver appointed by the mortgagee debenture-holders exercised the power of sale and that as there is no allegation of want of *bona fides* or recklessness or fraud against the Receiver in exercising such a power, it would follow that the sale held by the Receiver is valid and effectual to convey title to the purchaser and that such a sale cannot be avoided on the ground either of want of due notice given by the Receiver before effecting the sale or on the ground of under-value".

The result therefore is that the appeal fails and must be dismissed with costs of the contesting Respondent 3. The other Respondents who have appeared before us will bear and pay their own costs of the appeal.

G.R./K.S. *Appeal dismissed.*

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—S. R. DAS, N. H. BHAGWATI AND B. P. SINHA, JJ.

The Registrar of Trade Marks .. *Appellant**

v.

Ashok Chandra Rakhit, Ltd. .. *Respondent.*

Trade Marks Act (V of 1940), sections 13 and 46 (4)—Rectification of register by inserting a disclaimer of a word " not separately registered " included in a registered trade mark—Jurisdiction of Registrar—Interference with exercise of—Considerations.

The power of the tribunal (the Registrar) to require a disclaimer is conditioned and made dependent upon the existence of one of two things which are set out in clauses (*a*) and (*b*) of section 13 of the Trade Marks Act. It is only on the establishment of one of the two jurisdictional facts that the Registrar's jurisdiction regarding imposition of a disclaimer arises. Before, however, he may exercise his discretion he must find and hold that there are parts or matters included in the trade mark to the exclusive use of which the proprietor is not entitled and it is only after this finding is arrived at that the Registrar becomes entitled to exercise his discretion. The exercise of the power conferred by the Register by this section always remained a matter of discretion to be exercised not capriciously or arbitrarily but according to sound principles laid down for the exercise of all judicial discretion. The tribunal will exercise the discretionary power only for good cause shown. If that authority has exercised his discretion in good faith and not in violation of any law such exercise of discretion should not be interfered with by the High Court merely on the ground that it could have been exercised differently or even that the High Court would have exercised it differently, had the matter been brought before it in the first instance. The real purpose of requiring a disclaimer is to define the rights of the proprietor under the registration so as to minimise, even if it cannot wholly eliminate, the possibility of extravagant and unauthorised claims being made on the score of registration of the trade marks. The proviso to the section preserves intact any right which the proprietor may otherwise under any other law have in relation to the mark or any part thereof. The disclaimer is only

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1. L.R. (1923) A.C. 647.

* Civil Appeal No. 116 of 1953. 15th April, 1955.

for the purposes of the Act. It does not affect the rights of the proprietor except such as arise out of registration. If the proprietor has aquired any right by long user of those parts or matters in connection with goods manufactured or sold by him or otherwise in relation to his trade, he may, on proof of the necessary facts, prevent an infringement of his rights by a passing off action or a prosecution under the Indian Penal Code. Disclaimer does not affect those rights in any way.

There may be a disclaimer in respect of parts contained in a trade mark registered as a whole although the registration of the mark as a whole does not confer any statutory right with respect to that part.

On Appeal from the Judgment and Order, dated the 23rd day of August, 1951, of the High Court of Judicature at Calcutta in Appeal No. 112 of 1950 arising out of the order, dated the 24th day of March, 1950, of the Registrar of Trade Marks in the matter of Registered Trade Mark No. 3815.

C. K. Daphtary, Solicitor-General for India (*K. S. Shavakasha* and *R. H. Dhebar*, Advocates, with him) for the Appellant.

S. C. Isaacs, Senior Advocate, (*P. K. Ghosh*, Advocate, with him) for the Respondent.

The Judgment of the Court was delivered by—

Das, J.—This is an appeal from the judgment and order pronounced on the 23rd August, 1951, by a Division Bench of the High Court at Calcutta in Appeal No. 112 of 1950 reversing the decision of the Registrar of Trade Marks, dated the 24th March, 1950, whereby he had rectified the register by inserting a disclaimer of the word "Shree" forming part of the respondent company's registered trade mark No. 3815.

The material facts are as follows : In the year 1897 one Durga Charan Rakhit (since deceased) adopted as his trade mark in respect of the ghee produced and marketed by him a device which, with some slight modification not materially altering its essential features, was, on the application of the respondent company, registered as its trade mark No. 3815. That mark was and is a device consisting of the word "Shree" written on the top in bold Bengali character, having below it an ornamental figure with the word "Shree" written in the centre in small Deva Nagri character, the word "*TRADE*" written in English in an inclined manner on the left hand side of the ornamental figure and the word "*MARK*" written in English in an inclined manner on the right hand side of the ornamental figure and the words "Shree Durga Charan Rakhit" written at the bottom in Bengali characters. The ornamental figure referred to above consists of a triangle over which is another inverted triangle and in the centre the word "Shree" in small Deva Nagri character as mentioned above, the whole of the said ornamental figure being enclosed in a circle outside which are twelve ornamental petals. In the affidavit affirmed by Malli Nath Rakhit, a director of the respondent company and filed in these proceedings, this mark has throughout been referred to as "the said mark SREE." The said Durga Charan Rakhit having subsequently been adjudged insolvent all his properties including the goodwill of his ghee business and the said mark vested in the Official Assignee of Calcutta. On the 15th January, 1915, the goodwill of the said business including the said mark was sold by the Official Assignee by public auction and one Hem Dev Konch, a minor was declared as the highest bidder and purchaser. A notice of the said sale was advertised in the Calcutta Exchange Gazette on the 25th January, 1915, by an attorney acting on behalf of the purchaser. On the 27th January, 1915, the said sale was confirmed by a Deed of assignment executed by the Official Assignee. On the 22nd August, 1917, Haripriya Konch, the father and natural guardian of the minor purchaser, acting as such and on behalf of the minor, conveyed to one Ashok Chandra Rakhit, son of the said Durga Charan Rakhit, the goodwill of the business including the right, title and interest in the said mark and the said Ashok Chandra Rakhit carried on the said businees and marketed ghee under the said mark. On the 15th September, 1926, the said Ashok Chandra Rakhit caused the fact of his ownership of the said mark to be advertised in the Calcutta Exchange Gazette and on the 22nd December, 1926, caused to be registered with the Registrar of Assurances of Calcutta a declaration of his owner-

ship of the said mark. In 1932 the respondent company was incorporated as a private limited company under the Indian Companies Act, 1913 and the said Ashok Chandra Rakhit assigned the goodwill of his said business and his right, title and interest in the said mark to the respondent company. In 1933 the respondent company's said mark was registered in the Trade Mark Registry at Hong-Kong under the provisions of the Hong-Kong Trade Marks Ordinance, 1909 and the fact of such registration was published in the Straits Settlements Government Gazette. In 1934 two persons, Rajendra Prasad and Dilliram, were, on complaint made on behalf of the respondent company, convicted by the Chief Presidency Magistrate of Calcutta under section 486, Indian Penal Code, for infringing the said mark and such conviction was upheld by the Calcutta High Court. In 1935 one Chiranjilal Sharma was, on like complaint, convicted by the Chief Presidency Magistrate for infringement of the said mark. The Volume of the respondent company's business in ghee done under the said mark is said to be considerable, the annual turn over varying from Rs. 10,00,000 to Rs. 15,00,000 and the annual cost of advertisement being anything between Rs. 10,000 and Rs. 39,000. It is also said that the ghee marketed by the respondent company and its predecessors is well known by the said mark and is always asked for under the name " Shree."

The Indian Trade Marks Act, 1940, having been brought into force in 1942 the respondent company on the 21st August, 1942, filed an application for the registration of its said mark under the Act. By his letter dated the 29th November, 1943, the Registrar proposed that there should be a disclaimer of the word "Shree." The respondent company by its agents' letter dated the 15th February, 1944, intimated to the Registrar that it could not agree to the proposal as " the trade mark Shree is very important in the device " and " the ghee is commonly designated by the trade mark Shree." The respondent company also submitted an affidavit affirmed by one Bidyut Bikash Rakshit, a director of the respondent company, in support of its objection. The Registrar not having then pressed his proposal for disclaimer the respondent company's said mark was duly registered as trade mark No. 3815.

It appears that subsequently the Registrar found that the word " Shree " was used by Hindus as an auspicious symbol and placed even on letter heads and that consequently it was not adapted to distinguish within the meaning of the Act. In course of time, therefore, a practice became established in the Registry whereby the word " Shree " was either refused registration as a trade mark or a disclaimer was enforced if it were made a part of a trade mark. So inflexible had been this practice that barring this particular trade mark No. 3815 there was no other trade mark containing the word " Shree " which had been registered without a disclaimer of the word "Shree." Naturally this circumstance was bound to be regarded as an invidious discrimination and, indeed, pointed reference is said to have been made to it and it was suggested that the Registry should deal impartially and uniformly with all applications in matters relating to practice. This aspect of the matter having been pressed upon the Registrar he took steps under section 46 (4) of the Trade Marks Act, 1940 and on the 8th March, 1947, issued a notice calling upon the respondent company to show cause why the register should not be rectified by entering a disclaimer of the exclusive right in regard to the word " Shree." The respondent company showed cause by filing an affidavit affirmed by Malli Nath Rakhit to which reference has been made. After hearing learned counsel for the respondent company the Registrar came to the conclusion that the word " Shree " was not adapted to distinguish and, for reasons stated in his judgment delivered on the 24th March, 1950, directed rectification of the register by inserting a disclaimer of the word " Shree " in the following terms :

" Registration of this Trade Mark shall give no right to the exclusive use of the word ' Shree ' ".

Feeling aggrieved by the aforesaid decision the respondent company preferred an appeal to the High Court at Calcutta under section 76 of the Act. The High Court also took the view that " Shree " was a word which had numerous meanings and that it would be impossible for any trader to contend that he had an exclusive

right to the use of such a word. But the High Court went on to hold that there was no ground whatsoever for the order made by the Registrar as the respondent company had never claimed that it had any right to the exclusive use of the word " Shree." In the result, the High Court allowed the appeal and set aside the order of the Registrar rectifying the register. Being of the opinion that the point involved was a novel one in this country and was of importance and would affect the attitude of the Registrar in future cases, the High Court certified that it was a fit case for appeal to this Court under Article 133 (1) (*c*) of the Constitution. Hence the present appeal by the Registrar.

The order of rectification of the register by inserting a disclaimer was made by the Registrar under section 13 read with section 46 (4) of the Trade Marks Act, 1940. Section 13 runs as follows :—

" 13. *Registration subject to disclaimer* :—If a trade mark contains—

(*a*) any part not separately registered as a trade mark in the name of the proprietor, or for the separate registration of which no application has been made, or

(*b*) any matter common to the trade, or otherwise of a non-distinctive character,

the tribunal, in deciding whether the trade mark shall be entered or shall remain on the register may require, as a condition of its being on the register, that the proprietor shall either disclaim any right to the exclusive use of such part or of all or any portion of such matter, as the case may be, to the exclusive use of which the tribunal holds him not to be entitled, or make such other disclaimer as the tribunal may consider necessary for the purpose of defining the rights of the proprietor under the registration :

Provided that no disclaimer shall affect any rights of the proprietor of a trade mark except such as arise out of the registration of the trade mark in respect of which the disclaimer is made."

At the outset it will be noticed that the power of the tribunal to require a disclaimer is conditioned and made dependent upon the existence of one of two things which are set out in clauses (*a*) and (*b*) and which have been called the jurisdictional facts. It is only on the establishment of one of the two jurisdictional facts that the Registrar's jurisdiction regarding imposition of a disclaimer arises. Before, however, he may exercise his discretion he must find and hold that there are parts or matters included in the trade mark to the exclusive use of which the proprietor is not entitled and it is only after this finding is arrived at that the Registrar becomes entitled to exercise his discretion. In course of the argument it was at one time contended that upon the establishment of the requisite jurisdictional fact and upon the finding that the proprietor was not entitled to the exclusive use of any particular part or matter contained in the trade mark the Registrar became entitled, without anything more, to require a disclaimer of that part or matter. This extreme position, however, was not maintained in the end and it was conceded, as indeed it had to be, that the exercise of the power conferred on the Registrar by this section always remained a matter of discretion to be exercised, not capriciously or arbitrarily but, according to sound principles laid down for the exercise of all judicial discretion. (*See* the observations of Lord Halsbury, L.C., in *Sharp* v. *Wakefield*[1].) As the law of Trade Marks adopted in our Act merely reproduces the English Law with only slight modifications, a reference to the judicial decisions on the corresponding section of the English Act is apposite and must be helpful. Section 15 of the English Act of 1905 which later on was reproduced in section 14 of the English Act of 1938 and which corresponds to our section 13, was considered by the High Court in England in In re *Albert Baker Company's Application* and In re *Aerated Bread Company's Application*[2] which is commonly called the *A.B.C. case*. In that case Eve, J., found on the evidence that Albert Baker Company were widely known as " A.B.C." or " A.B. & Co." but that the letters " A.B.C." did not exclusively indicate their goods and that those letters being common to the trade they were not entitled to the exclusive use of those letters. Nevertheless the learned Judge did not hold that that finding alone concluded the matter. Said the learned Judge :

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1. L.R. (1891) A.C. 173 at 179.

2. L.R. (1908) 2 Ch. 86 ; 25 R.P.C. 513.

"The first observation which it occurs to me to make is that the object of the Legislature was to relieve traders from the necessity of disclaiming, and I think it follows from this that the condition is one for the imposition of which some good reason ought to be established rather than one which ought to be imposed, unless some good reason to the contrary is made out. This conclusion is, I think, fortified by the frame of the section, which is in an enabling form empowering the tribunal to impose the condition—a power which, I conclude, the tribunal would only exercise for good cause shewn".

It follows from what has been stated above that the existence of one of the two jurisdictional facts referred to in clauses (*a*) and (*b*) of section 13 and the finding that the trade mark contains parts or matters to the exclusive use of which the proprietor is not entitled does not conclude the matter and it must further be established that some good reason exists for the imposition of a disclaimer and the tribunal will only exercise the discretionary power for good cause shown.

The second thing to be borne in mind, if the provisions of section 13 are to be properly understood and carried into effect, is that the section confides a discretionary power in the "tribunal" which, by virtue of section 2 (*n*), means the Registrar or, as the case may be, the Court before which the proceeding concerned is pending. An application for the rectification of the register may, under sub-sections (1) and (2) of section 46, be made either to the Registrar or the High Court and sub-section (4) of that section, under which the present proceedings were initiated by the Registrar, authorises both the High Court and the Registrar to take proceedings *suo motu*. In view of the fact that discretion is given also to the High Court under section 13 a question may be raised as to whether the observations made by P.O. Lawrence, J., in In the matter of *An application by the Diamond T. Motor Car Co.*[1] namely, that in dealing with an appeal from the Registrar's decision under section 8 (2) of the English Act of 1919 the High Court is not fettered by reason of the Registrar on the hearing before him having exercised his discretion, apply to our High Court hearing appeals under section 76 of our Act from decisions of the Registrar given under section 13 of our Act and whether in that situation our High Court may exercise its own discretion just as it could if the proceedings had initially been taken before it. Assuming, but without deciding, that they do apply, it must, nevertheless, be remembered, adapting the language of Lord Macnaghten in *Eno* v. *Dunn*[2] that it is the Registrar "to whom in the first instance is committed the discretionary power." If that authority has exercised his discretion in good faith and not in violation of any law such exercise of discretion should not be interfered with by the High Court merely on the ground that, in the opinion of the High Court, it could have been exercised differently or even that the High Court would have exercised it differently, had the matter been brought before it in the first instance. The proper approach in such a case is for the High Court to consider, as said by Lord Dunedin in In the matter of *An application by F. Reddaway & Co. Ltd.*[3], "whether the Registrar had really gone so wrong as to make it necessary to interfere with his discretion."

The third thing to note is that the avowed purpose of the section is not to confer any direct benefit on the rival traders or the general public but to define the rights of the proprietor under the registration. The registration of a trade mark confers substantial advantages on its proprietor as will appear from the sections grouped together in Chapter IV under the heading "Effect of Registration." It is, however, a notorious fact that there is a tendency on the part of some proprietors to get the operation of their trade marks expanded beyond their legitimate bounds. An illustration of an attempt of this kind is to be found in In re *Smokeless Powder Co.'s. Trade Mark*[4]. Temptation has even led some proprietors to make an exaggerated claim to the exclusive use of parts or matters contained in their trade marks in spite of the fact that they had expressly disclaimed the exclusive use of those parts or matters. Reference may be made to *Greers Ltd.* v. *Pearman and Corder Ltd.*[5] commonly called the "*Banquet*" *case*. The real purpose of requiring a disclaimer is to define the rights of the proprietor under the registration so as to

1. (1921) 38 R.P.C. 373 at 379.
2. L.R. (1890) 15 A.C. 252 at 263; 7 R.P.C. 311 at 318.
3. (1926) 44 R.P.C. 27 at 36.
4. L.R. (1892) 1 Ch. 590; 9 R.P.C. 109.
5. (1922) 39 R.P.C. 406.

minimise, even if it cannot wholly eliminate, the possibility of extravagant and unauthorised claims being made on the score of registration of the trade marks.

The last feature of the section is its proviso. That proviso preserves intact any right which the proprietor may otherwise under any other law have in relation to the mark or any part thereof. The disclaimer is only for the purposes of the Act. It does not affect the rights of the proprietor except such as arise out of registration. That is to say, the special advantages which the Act gives to the proprietor by reason of the registration of his trade mark do not extend to the parts or matters which he disclaims. In short, the disclaimed parts or matters are not within the protection of the statute. That circumstance, however, does not mean that the proprietor's rights, if any, with respect to those parts or matters would not be protected otherwise than under the Act. If the proprietor has acquired any right by long user of those parts or matters in connection with goods manufactured or sold by him or otherwise in relation to his trade, he may, on proof of the necessary facts, prevent an infringement of his rights by a passing off action or a prosecution under the Indian Penal Code. Disclaimer does not affect those rights in any way.

Keeping, then, in view the meaning and scope of section 13 of our Trade Marks Act, 1940 and its underlying purpose as discussed above we proceed to consider whether in the circumstances of the present case the Registrar had exercised his discretion properly in inserting in the register a disclaimer of the word " Shree." It has not been disputed that the respondent company's registered trade mark No. 3815 is a distinctive device properly registrable under section 6 of the Act. It is also a fact that it contains, as its prominent part, the word " Shree " which is not separately registered as a trade mark in the name of the respondent company and, indeed, no application had been made by it for the separate registration of that word. There can, therefore, be no doubt as to the existence of the jurisdictional fact referred to in clause (*a*) of that section. Further, the Registrar found as a fact, for reasons stated by him, that the word " Shree " was not adapted to distinguish, which means that it did not pass the test for registrability laid down in section 6 and in particular in sub-section (3) thereof. The High Court also unequivocally took the view that " Shree " is a word which had numerous meanings and that it would be impossible for any trader to contend that he had an exclusive right to the use of such a word. It, therefore, follows that the respondent company's trade mark was concurrently held to have contained matters of a non-distinctive character and consequently the second jurisdictional fact was also present in this case. It, nevertheless, appeared to the High Court that there was no ground whatsoever for the order made by the Registrar. The High Court read the decision of the Registrar as proceeding only on what was described as an inflexible practice established in the Registry whereby the word " Shree " was either refused registration as a trade mark or a disclaimer was enforced if it was a part of a trade mark and in this view the case appeared to the High Court to be indistinguishable from the case of In re *Cadbury Brother's Application.*[1]

That case was decided under section 9 of the English Act of 1905. Clause (5) of section 9 was then expressed in language which is somewhat different from clause (5) of section 6 of our Act. Under section 9 (5) of the English Act of 1905 a name, signature or word or words otherwise than such as fell within the description in the preceding paragraphs 1 to 4 could not, except by the order of the Board of Trade or by the Court, be deemed a distinctive mark. ' Tudor ' being a surname did not fall within clause (4) of that English Act and, therefore, the Registrar had no power to register it as a distinctive mark under clause (5). Such being the position, the then Registrar of Trade Marks in England adopted a practice that wherever a mark contained a name which did not come within clause (4) and which he had no power to register under clause (5), there must be a disclaimer of that word without going into any investigation as to its distinctiveness. The Registrar in that case declined to register the mark only because it contained a name which

1. L.R. (1915) 2 Ch. 307 ; 32 R.P.C. 456.

could not be registered alone by him under section 9 (5), without deciding whether that word was a matter of a distinctive or non-distinctive character, in pursuance of the inflexible practice that he had adopted, namely, of refusing registration in the absence of a disclaimer. This decision of the Registrar was overruled by Sargant, J. The learned Judge, on the materials before him, came to the conclusion that the word ' Tudor ' was not common to the trade and that the word as it had been used by the applicants in relation to chocolates was not a matter of non-distinctive character and that it had denoted their goods. Consequently, the jurisdiction to impose a disclaimer did not arise under clause (*b*) of section 15 of the English Act of 1905. The jurisdiction, if at all, could, therefore, arise only under clause (*a*), namely, that the trade mark contained parts not separately registered by the proprietor as trade marks. Having come to the conclusion that the word ' Tudor ' was a matter of distinctive character as it denoted the goods of the applicant's manufacture, the Court might have disposed of the case on the short ground that, on that finding, the applicant was entitled to the exclusive use of that name in connection with chocolates and like goods and, therefore, no question of requiring a disclaimer could, in that situation, arise at all. Treating the matter, however, as still one of discretion, the learned Judge had to take into account the commercial case made on behalf of the applicants, namely, that they would, by disclaiming any right to the exclusive use of the word ' Tudor,' practically be inviting the public to disregard such common law rights as they had acquired to the use of the name ' Tudor' and held that to impose a disclaimer of that word, in spite of the finding as to its distinctiveness in relation to the goods of the applicants, would be to drive the applicants to take innumerable passing off actions.

The facts of that case appears to us to be clearly distinguishable from those of the case now before us. Here the concurrent finding of the Registrar and the High Court is that the word " Shree " is not adapted to distinguish and is not a word to the exclusive use of which any trader may claim the right. In the face of this finding the consideration of the possibility that a disclaimer may drive the respondent company to a crop of passing off actions was not so relevant or urgent as it was in the Tudor case.[1] In view of the finding in the present case the respondent company could well be left, as it was in fact left, to protect its rights by other proceedings, *e.g.*, passing off actions or prosecutions which, by reason of the proviso, were open to be taken by it, if the necessary facts to support such proceedings which were not before the Registrar could be satisfactorily established.

Further, it is not quite correct to say that the Registrar, like his English counterpart, had based his decision entirely on what has been called his invariable practice. It is no doubt true that the Registrar did, in this case, lay considerable stress on that aspect of the matter and may even be said to have somewhat overemphasized the practice of his Registry but it is not correct to say that his decision was entirely founded on that practice alone. The materials before the Registrar, appearing on the affidavit filed on behalf of the respondent company, clearly indicated that the respondent company was claiming a proprietary right to the name " Shree." Indeed, it called its mark as " the said mark Sree " throughout the affidavit and claimed that the said mark " Shree " was well known in the market and that its ghee was asked for and sold under the said mark " Shree." The two prosecutions launched by it and the other facts mentioned in the main affidavit and the two supporting affidavits of two retail dealers and summarised at the beginning of this judgment clearly indicate that it was claiming the right to the exclusive use of the word " Shree " and, indeed, in its agents' letter of the 15th February, 1944, objecting to any disclaimer of that word, it was referred to " as trade mark Shree " and it was said to be " very important in the devise." In other words, they put forward the claim that " Shree " itself was also its trade mark, apart from the device as a whole and that it was an important feature of its device. It is, therefore, not at all surprising that learned counsel appearing for the respondent company before the

1. L.R. (1915) 2 Ch. 307 : 32 R.P.C. 456.

Registrar, when asked as to how his client could possibly be affected by disclaiming the word "Shree," said frankly that it was far easier to be successful in an infringement action than in a passing off action. This clearly indicated that the respondent company did not want any other merchant to use the word "Shree" in his trade mark in respect of ghee and that the respondent company thought that the registration of its trade mark with the word "Shree" contained in it would, *per se*, give it a right also to that word and that its intention was to launch infringement actions under the Act against any other trader who might happen to use the word "Shree" either alone or as part of his trade mark in respect of ghee. Further, the Registrar may well have thought that the fact that all other traders who had got their trade marks containing the word "Shree" registered had had to submit to a disclaimer of the word "Shree" whereas the respondent company had got its trade mark containing the word "Shree" registered without a disclaimer was calculated to cause embarrassment to other traders and might conceivably encourage the respondent company to contend that the registration of its trade mark by itself and without further evidence gave it a proprietary right to the exclusive use of the word "Shree." The respondent company may also find some encouragement from the observations of Lord Radcliffe in *De Cordova and others* v. *Vick Chemical Coy.*[1], namely, that if a word forming part of a mark has come in trade to be used to identify the goods of the owner of the mark, it is an infringement of the mark itself to use that word as the mark or part of the mark of another trader, for confusion is likely to result. These considerations may reasonably have led the Registrar to require a disclaimer. None of these considerations arose or were adverted to in the Tudor case and this circumstance quite clearly distinguishes the present case from that case.

It is true that where a distinctive label is registered as a whole, such registration cannot possibly give any exclusive statutory right to the proprietor of the trade mark to the use of any particular word or name contained therein apart from the mark as a whole. As said by Lord Esher in *Pinto* v. *Badman*[2] :

> "The truth is that the label does not consist of each particular part of it, but consists of the combination of them all".

Observations to the same effect will be found also in In re *Apollinaris Company's Trade Marks*[3], In re *Smokeless Powder Co.*[4] In re *Clement & Cie*[5] and In re *Albert Baker & Company*[6] and finally in the *Tudor case*[7] referred to above which was decided by Sargant, J. This circumstance, however, does not necessarily mean that in such a case disclaimer will always be unnecessary. It is significant that one of the facts which give rise to the jurisdiction of the tribunal to impose disclaimer is that the trade mark contains parts which are not separately registered. It is, therefore, clear that the section itself contemplates that there may be a disclaimer in respect of parts contained in a trade mark registered as a whole although the registration of the mark as a whole does not confer any statutory right with respect to that part.

As we have already stated the possibility of the proprietor attempting to expand the operation of his trade mark cannot be ignored or overlooked. It is a thing which must be taken into consideration by the tribunal—be it the Registrar or the Court—in deciding upon the way it should exercise the discretionary power conferred on it. Reference has been made by the High Court to the observations of Eve, J., in the *A.B.C. case*[8] referred to above and the question has been posed as to whether any good cause had been shown for the necessity of disclaimer in this case. The High Court answers the question immediately by saying that it did not think that any cause had been shown beyond the desirability of having a uniform practice. This, as we have already stated, is not quite correct, for apart from the practice the Registrar did advert to the other important consideration, namely, that on the evidence

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1. (1951) 68 R.P.C. 103 at 106.
2. 8 R.P.C. 181 at 191.
3. L.R. (1891) 2 Ch. 186.
4. L.R. (1892) 1 Ch. 590 : 9 R.P.C. 109.
5. L.R. (1900) 1 Ch. 114.
6. L.R. (1908) 2 Ch. 86 : 25 R.P.C. 513.
7. L.R. (1915) 2 Ch. 307 : 32 R.P.C. 456.
8. L.R. (1908) 2 Ch. 86 : 25 R.P.C. 513.

before him and the statement of counsel it was quite clear that the reason for resisting the disclaimer in this particular case was that the company thought, erroneously no doubt but quite seriously, that the registration of the trade mark as a whole would, in the circumstances of this case, give it a right to the exclusive use of the word "Shree" as if separately and by itself it was also its registered trade mark and that it would be easier for it to be successful in an infringement action than in a passing off action. It was precisely the possibility of such an extravagant and untenable claim that called for a disclaimer for the purpose of defining the rights of the respondent company under the registration. This aspect of the matter does not appear to have been pressed before or adverted to by the High Court.

Considering all the circumstances discussed above, we are not of opinion that the Registrar had gone so wrong as to have made it necessary for the High Court to interfere with his discretion. If it were to be regarded as a matter of exercise of discretion by the High Court as to whether a disclaimer should be imposed or not, it is quite clear that the attention of the High Court was not drawn to an important consideration, namely, the strong possibility of the respondent company claiming a statutory right to the word "Shree" by virtue of the registration of its trade mark and subject others to infringement actions only on the strength of the registration and without proof of facts which it would have otherwise to establish in order to succeed in a passing off action or a prosecution under the Indian Penal Code, and, therefore, the High Court cannot be said to have properly exercised its discretion.

The result, therefore, is that this appeal must be allowed and the respondent company must pay the appellant's costs in this Court and in the High Court.

G.R./K.S. ——— *Appeal allowed.*

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—VIVIAN BOSE, B. JAGANNADHADAS AND B. P. SINHA, JJ.

Anil Behari Gosh .. *Appellant**

v.

Smt. Latika Bala Dassi and others .. *Respondents.*

Succession Act (XXXIX of 1925), *section* 263—*Scope—Application for revocation of probate—Matters that can be gone into—Omission to issue citations to persons who should have been apprised of the probate proceedings—Effect.*

Section 263 of the Succession Act contemplates a case for revocation based on the single ground that the will in respect of which the grant in question was obtained was a forged one. In such a case, whether or not the will was a forged one would be the only question to be canvassed before the order of revocation could be made. *Mokshadayini Debi* v. *Karnadhar Mandal*, (1914) 19 C.W.N. 1108, distinguished.

The omission to issue citations to persons who should have been apprised of the probate proceedings may well be in a normal case a ground by itself for revocation of the grant. But this is not an absolute right irrespective of other considerations arising from the proved facts of a case. The law has vested a judicial discretion in the Court to revoke a grant where the Court may have *prima facie* reasons to believe that it was necessary to have the will proved afresh in the presence of interested parties. In the instant case about 27 years had elapsed after the grant of probate in 1921, and *X*, the party interested to whom citation had not been issued in spite of the knowledge of the grant at the latest in 1933 did not take any steps in his life-time to have the grant revoked. There was no suggestion that the will was a forgery or was otherwise invalid and the will was a registered one and had been executed eight years before the testator's unnatural death.

Held :—The omission of citations to *X* which ordinarily may have been sufficient for revocation of the grant was not in the special circumstances of the case sufficient to justify the Court to revoke the grant. Where the validity or the genuineness of a will has not been challenged it would serve no useful purpose to revoke the grant and to make the parties go through the formality of proving the will over again. The omission of citation has had no effect on the regularity of the proceedings resulting in the grant of 1921. The annulment is a matter of substance and not of mere form.

If an application for revocation of a grant alleges as a ground for such revocation that the testator had revoked the will, he has got to prove that alleged fact at least *prima facie* before he can be entitled to an order of revocation. Where it is not alleged that there has been "wilful default without any

* Civil Appeal No. 106 of 1953. 15th April, 1955.

reasonable cause" on the part of the executor to file accounts, the revocation of the grant cannot be ordered merely on the ground of omission to file accounts.

On Appeal from the Judgment and Order, dated the 4th September, 1951, of the High Court of Judicature at Calcutta in Appeal from Original Order No. 131 of 1950 arising out of the Order, dated the 29th day of August, 1950, of the High Court of Calcutta in its Testamentary Intestate Jurisdiction made in Application under Section 263 of the Indian Succession Act.

P. N. Sen, Senior Advocate (*A. K. Dutt* and *S. Ghose*, Advocates, with him), for Appellant.

M. C. Setalvad, Attorney-General for India (*A. N. Sinha*, Advocate, with him), for Respondent No. 1.

D. N. Mukherji, Advocate, for Respondent No. 2.

The Judgment of the Court was delivered by

Sinha, J.—This is an appeal against the judgment and order, dated the 4th September, 1951, of the Calcutta High Court in its appellate jurisdiction reversing those, dated the 29th August, 1950, of a Judge of that Court sitting on the Original Side granting the appellants' prayer for revoking and annulling the probate granted in respect of the last will and testament dated the 29th July, 1912, of one Binod Lal Ghosh, deceased, whom we shall call the testator in the course of this judgment.

The testator is said to have executed a will on the 29th July, 1912, which was registered on the same date at the Calcutta registery office. By the said will the testator appointed the following five persons as executors or executrices :—

(1) Anil Nath Basu, Attorney-at-Law.

(2) Brindaban Chandra Mitter.

(These two also figure as attesting witnesses to the will).

(3) His adopted son Charu Chandra Ghose (whom we shall call Charu for the sake of brevity) a minor on his attaining majority.

(4) His wife Haimabati Dasi and

(5) His brother's widow Muktakesi Dasi.

He also directed that on the death of the said Anil Nath Basu, his son Achintya Nath Basu, and on the death of Brindaban Chandra Mitter, his son Debi Prosad Mitter will take their places respectively as executors ; and on the death of his wife Haimabati Dasi, Charu's wife, Latikabala Dasi, and on the death of Muktakesi Dasi, his nephew's wife Sushamabala Dasi will take her place respectively as executrix. It is not necessary to set out in detail the legacies created by the will except to state that he created annuities in favour of a number of persons including his wife, his brother's widow Muktakesi Dasi, his daughter-in-law, his niece-in-law aforesaid and Charu. He also made provision in his will for annual payments in respect of the expenses of certain deities and festivals, as also for the funeral expenses of himself and the annuitants aforesaid. He directed his executors to accumulate Rs. 12,000 a year out of the balance left after meeting the annuities and the other annual expenses aforesaid to be paid over to Charu upon the death of the said Latikabala Dasi and Sushamabala Dasi who were to share the residue, if any after paying the annuities and other outgoings referred to above. It would thus appear that though the testator intended Charu to be the owner of his entire estate including the accumulations after meeting the annuities and the other annual expenses, he did not trust him to the extent of putting that estate into his hands immediately on his attaining majority. He trusted Charu's wife and the other ladies in his family more than Charu himself, though he specifically stated in the will—

"Provided always that the said adopted son shall be deemed to have a vested interest in the said estate immediately on my death".

He appointed his wife Haimabati Dasi as the guardian of the person and property of Charu and of his wife Latikabala Dasi aforesaid.

On the 5th March, 1920, the testator is said to have been murdered by Charu who was placed on his trial, convicted for murder and sentenced to transportation for life. Charu served his term of imprisonment and was released from jail some time in 1933.

On the 30th September, 1921, an application for probate of the will aforesaid was made on the Original Side of the Calcutta High Court on behalf of Anil Nath, Muktakesi Dasi and Latikabala Dasi aforesaid. The application stated that the testator died on the 5th March, 1920, at Baranagar, leaving him surviving his adopted son Charu and his widow Haimabati Dasi. The will, dated the 29th July, 1912, was recited and the five persons named above were said to have been appointed executors and executrices of the will. It also stated that Brindaban Chandra Mitter, one of the executors named in the will, had died in July, 1913 and his son Debi Prosad Mitter was a minor. It also recited the death of Haimabati Dasi on the 22nd May, 1921, thus explaining why out of the five executors and executrices named in the will the application had been made only on behalf of the surviving three persons. The assets of the testator's estate were stated not to exceed a sum of Rs. 4,75,780. The prayer was

> " that probate of the said will may be granted to your petitioners limited within the Province of Bengal reserving power of making the like grant to the said Charu Chandra Ghose and the said Debi Prosad Mitter (when he comes of age) when they will come and pray for the same."

The grant was made the same day (*i.e.*, 30th September, 1921) which fell during the long vacation and the Judge in charge passed the order—"Order as prayed" no citations being issued. This is material in view of what has been alleged subsequently about this grant, as will presently appear.

Nothing was heard about these proceedings until the 24th July, 1933, when an application was made by Debi Prosad Mitter aforesaid for the grant of probate to him along with Anil Nath Basu and Latikabala Dasi. In that application, the previous grant of probate dated the 30th Spetember, 1921, the death of Muktakesi Dasi some time in October, 1932 and the fact of his attaining majority some time in January, 1924, are recited. On 16th September, 1933, Debi Prosad Mitter's application was granted.

It appears that Latikabala Dasi and Sushamabala Dasi applied to the Calcutta High Court on the 4th December, 1933, for an order for discharging the executors appointed previously and for a direction to hand over the entire estate of the testator to the applicants. In answer to the summons Debi Prosad Mitter made an affidavit on the 7th December, 1933, in which he recited the previous grants of the probate made in 1921 and 1933 ; and stated that the testator Binod Lal Ghosh was murdered on the 5th March, 1920, by Charu and that on the death of Haimabati in May, 1921, the testator's first cousin Girish Chandra Ghosh became entitled to the residue of the estate of the testator. In that affidavit he set out the genealogical table of the family of the testator showing how Girish Chandra Ghosh was related to the deceased. He also made pointed reference to the fact that the surviving grantees of the probate, Anil Nath Basu and Latikabala Dasi, after the death of Haimabati had not filed any account of the testator's estate in their capacity as executor and executrix respectively and that on his obtaining probate of the will those persons had not complied with his request of furnishing a statement of accounts about their dealings with the testator's estate. He also set out the text of the letter sent by his solicitor to Anil Nath Basu and Latikabala Dasi. The letter is dated the 4th December, 1933.

It does not appear from the record as to what attitude had been taken by the executor and the executrix aforesaid in answer to the call made by Debi Prosad Mitter for submission of accounts of their dealings with the testator's estate after the grant of probate in 1921 as aforesaid. Ultimately, on the 16th May, 1934, the High Court dismissed the application for discharging the persons who had been granted the probate. Girish Chandra Ghosh aforesaid died in December, 1940, without having taken any steps in Court claiming his rights, whatever they were,

in the testator's estate. Anil Nath Basu also died in July, 1948. He does not appear from the record to have rendered any accounts in respect of his dealings as the managing executor of the will of the deceased.

It was not until the 17th September, 1949, that the appellant, who is one of the four sons of the said Girish Chandra Ghosh, made an application to the Calcutta High Court on the Original Side praying that the probates dated the 30th September, 1921 and the 16th September, 1933, in respect of the will dated the 29th July, 1912, be revoked, annulled and/or set aside and that an administrator *pendente lite* be appointed. The petition runs into about twenty printed pages setting out the petitioner's relationship with the testator, the will and the grant of the probates as aforesaid, the murder of the testator by Charu, his trial, conviction and sentence for that murder. It was also averred that the testator had "intended to revoke his said will of 19th July, 1912." Then follows a long recital of facts tending to that conclusion. Then follows para. 19 which is in these terms :—

"From the said correspondence and papers it is absolutely clear that the said testator revoked his will of 29th July, 1912. Your petitioner submits that arrangements were being made for handing over the estate of the said Binod Lal Ghosh, deceased, in the hands of the Administrator-General of Bengal for the purpose of charity but the said purpose did not mature and under the circumstances your petitioner submits that the said will of 29th July, 1912, has been revoked by the said testator and no further will was executed in its place or stead".

Para. 23 is a statement of the grounds on which the case for revocation of the grants is founded. That paragraph is in these terms :—

"Your petitioner submits that the probates herein should be revoked as a just cause for doing so exists *inter alia*, on the following grounds :—

(*a*) That no notice of either application for probate was served on your petitioner's father, although he was the nearest male relative alive at the time when the said Binod Lal Ghose was murdered ;

(*b*) That the grants were obtained fraudulently ;

(*c*) That the grants were obtained by means of an untrue allegation of a fact essential to justify the grant ;

(*d*) That the grants were obtained by making a false declaration that the property was valued only at Rs. 4,75,780, although the High Court in its Criminal Jurisdiction had stated in 1920 that the estate of the said Binod Lal Ghosh was over Rs. 40,00,000 ;

(*e*) That the grants in any event, are useless and inoperative ;

(*f*) That there was no filing of accounts ;

(*g*) That the grants were issued by concealing the facts of the intention of the said testator to revoke the will ;

(*h*) That the deceased never lived within the Ordinary Original Civil Jurisdiction of this Hon'ble Court".

The application was opposed by Latikabala Dasi chiefly on the ground that no citation to Girish Chandra Ghosh was necessary, that in any event, he was cognisant of the probate proceedings and of the estate being administered by the executors and that he stood by. It was denied by her that the said Girish Chandra Ghosh was the nearest male relative of the testator or that Charu had murdered his adoptive father. It was also denied that the testator had revoked his will and that he died intestate as a result of which the petitioner and his three brothers became entitled to succeed to his estate. Achintya Nath Basu took similar grounds in opposition to the application for revocation. Debi Prosad Mitter by an affidavit of his own denied that there had been any just cause for revoking the probate but added that he had been discharged on his own application from further acting as one of the executors of the testator's will.

Though no issues were framed, the main grounds for revocation or annulment of the probates were as stated in para. 23 set out above. Mr. Justice P. B. Mukherjee who dealt with the case on the Original Side, after an elaborate consideration of the facts and circumstances of the case, passed orders revoking and annulling the grants aforesaid and directing

"that the will be proved in solemn form on notice to the applicant and the other sons of Girish and also after a general citation to all persons interested in the estate".

He also appointed the applicant, the appellant before us, as an administrator *pendente lite* with usual powers to take charge of the estate, with costs to the applicant to be paid out of the estate. He directed the other opponents-respondents to bear their own costs. On the points in controversy he came to the conclusion that Girish was related to the testator as a cousin, that there was no acquiescence on the part of Girish barring the appellant from pursuing his remedy, that the non-citation of Girish was by itself not sufficient to invalidate the grant, but that circumstance in conjunction with other facts, *viz.*, of material concealment of the fact that Charu had murdered the testator and that the testator had entertained an intention to revoke the will, though it had not actually been revoked, was sufficient ground for revoking the grant. He held further, on the authority of the decision in *Mokshadayini* v. *Karnadhar*[1], that the question whether the will had as a matter of fact been revoked would form the subject-matter for final determination after the revocation of the grants when fresh proceedings will be taken after due citation. He also held that in the circumstances of this case, though there was no averment of wilful default in exhibiting an inventory and accounts of the testator's estate, the executors were actually guilty of such a default and there was thus just cause for revoking the grant. He did not hold the other grounds of attack against the grant made out by the applicant; that is to say, he did not find it established that the estate was worth over Rs. 40,00,000 and that the declaration of the value of the testator's estate at Rs. 4,75,780 was false or fraudulent or that the grant had become useless or inoperative otherwise, or that the case could not be heard by the Calcutta High Court, on the Original Side.

On appeal by Latikabala Dasi, the Appellate Bench consisting of Sir Trevor Harries, C.J., and Banerjee, J., allowed the appeal and dismissed the application for revocation of the probate with costs of both the Courts. They held that the will in question was genuine and valid in view of the evidence and of the fact that its genuineness or validity had not been questioned specifically in the pleadings. They also held that there was no revocation of the will or even an intention on the part of the testator to revoke the will. They also held that Girish was entitled to citation but that the non-citation did not materially affect the grant of the probate and that at any rate, Girish being fully aware of the grant stood by, and therefore acquiesced in the grant, and did not take any steps at the right time to question the grant. They therefore did not think it just and expedient to reopen the proceedings when they were satisfied that there was no real and substantial attack against the genuineness and validity of the will itself.

In this appeal it has been argued on behalf of the appellant on the authority of the decision in *Mokshadayini* v. *Karnadhar*[1], that the Appeal Court should have agreed with the Judge on the Original Side in holding that there was material concealment of facts which considered along with the admitted position that no citation had been taken against Girish Chandra Ghosh had vitiated the proceedings for the grant of probate and that the question of the genuineness or validity of the will should have been left over for determination at a later stage of the proceedings. It was also argued that the omission to exhibit the accounts was in the circumstances of this case wilful default without reasonable cause within the meaning of the law and was sufficient by itself to entitle the applicant to a revocation. It was also argued that no grounds had been made out in fact to support the legal conclusion drawn by the Appeal Court that there had been an acquiescence on the part of Girish. On behalf of the 1st respondent the conclusion of the Appeal Bench has been supported on all the grounds. On behalf of the respondent, Debi Prosad Mitter, it was contended that he had been unnecessarily impleaded at all the stages and that he should have been granted his costs out of the estate of the deceased.

The grant of probate was made under the provisions of the Probate and Administration Act (V of 1881); but the Indian Succession Act (XXXIX of 1925) conso-

1. (1914) 19 C.W.N. 1108.

lidated the law relating to intestate and testamentary succession and thus incorporated the other Acts relating to the same subject, including Act V of 1881. In order to be entitled to a revocation or annulment of the grant aforesaid the appellant has to bring his case within the purview of section 263 of the Indian Succession Act (XXXIX of 1925), (which will hereinafter be referred to as the Act). Section 263 of the Act is substantially in the same terms as section 50 of Act V of 1881. Section 263 provides that

"The grant of probate or letters of administration may be revoked or annulled for just cause".

Under the Explanation—

"Just cause shall be deemed to exist where—

(*a*) the proceedings to obtain the grant were defective in substance, or

(*b*) the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case, or

(*c*) the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently, or

(*d*) the grant has become useless and inoperative through circumstances, or

(*e*) the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of this Part, or has exhibited under that Chapter an inventory or account which is untrue in a material respect".

After the Explanation, there are eight illustrations of the grounds on which a grant of probate may be revoked, of which the first three are material. They are as follows :—

" (i) The Court by which the grant was made had no jurisdiction.

(ii) The grant was made without citing parties who ought to have been cited.

(iii) The will of which probate was obtained was forged or revoked".

In this case the appellant tried to take advantage of the first illustration also, by suggesting in one of the grounds set out in para. 23 of his petition quoted above that the testator never lived within the Ordinary Original Civil Jurisdiction of the Calcutta High Court in exercise of which the grant in question had been made. But that ground was negatived by the trial Judge and as it was not pressed before us, no more need be said about it.

It was vehemently argued at all stages of the case including the appeal before us that admittedly no citation was issued against Girish Chandra Ghosh aforesaid and as he was the person most interested in the testator's estate besides the legatees named in the will, the case came directly within the purview of clause (*a*) of the Explanation and Illustration (ii) quoted above. Girish Chandra Ghosh has been found by the Judge in the first instance to have been the person most vitally interested in the estate of the testator, whether he died intestate or leaving a will, in the events which had happened. The learned counsel for the contesting respondent suggested thatit had not been found by the lower Appellate Court as a fact upon the evidence adduced in this case, that Girish was the nearest agnate of the testator or that Charu had murdered his adoptive father, though these matters had been assumed as facts. The Courts below have referred to good and reliable evidence in support of the finding that Girish was the nearest reversioner to the estate of the testator. If the will is a valid and genuine will, there is intestacy in respect of the interest created in favour of Charu, if he was the murderer of the testator. On this question the Courts below have assumed on the basis of the judgment of conviction and sentence passed by the High Court in the sessions trial that Charu was the murderer. Though that judgment is relevant only to show that there was such a trial resulting in the conviction and sentence of Charu to transportation for life, it is not evidence of the fact that Charu was the murderer. That question has to be decided on evidence. However, for purposes of this case we shall assume in favour of the appellant that Charu was the murderer. The result of such an assumption is that Girish being the nearest reversioner to the estate of the testator, in case of intestacy after the death of the testator's widow in 1921, or in case of testamentary succession after the death of the two legatees, the testator's daughter-in-law and the

nephew's wife aforesaid, and the failure of the legacy in favour of Charu on account of the murder would, in either event, have sufficient interest in the estate of the testator to entitle him to challenge the grant and to obtain revocation. But it is noteworthy that Girish who died in 1940, lived for about 19 years after the grant and took no steps in that direction. There may be some doubt as to Girish's knowledge of the probate proceedings and of the grant until 1933 ; but, in our opinion, there is ample evidence in support of the finding arrived at by the Court of Appeal below that Girish was aware of the grant at the latest in 1933 when Debi Prosad Mitter took proceedings to obtain a grant in his own favour also. In his application, as indicated above, he clearly stated that Charu was the murderer of his adoptive father and that Girish would succeed to his estate, which otherwise would have gone to Charu. If Girish had initiated proceedings for revocation of the grant and had insisted on the will being proved in his presence, the Courts would have had no difficulty in having all the necessary evidence before it because the chief person who had played the most leading part in the execution of the will, in its registration and in its being admitted, to probate, *viz.*, Anil Nath Basu, was then alive and could have been examined. But for reasons not made clear in these proceedings Girish did not think it worth his while to take any steps in Court to challenge the will or the grant. The estate was worth anything between five to forty lakhs, perhaps nearer five lakhs than forty lakhs. Girish was a mere pensioner belonging to a middle class family. Either he did not think it worth his while to embark on a litigation with all its uncertainties or he had not the wherewithal to do so. The record as it stands does not satisfactorily explain the reasons why Girish refrained from making any attempts to get this large estate. If the will was not genuine or valid, Girish would take the reversionary estate at once because the testator's widow died in 1921 and there was no other impediment in his way, except to get rid of the will. If, on the other hand, the will was genuine and valid, even then he would stand to gain all the interest which had been bequeathed in favour of Charu. The fact that Girish did not take advantage of his position as the nearest reversioner as on partial intestacy goes a long way to support the great probability of the will being valid and genuine, especially as it had been probated and because the appellant in his long petition for revoking the grant has not made the least suggestion casting any doubt on the genuineness and validity of the will. But it was argued on behalf of the appellant that that stage had not yet arrived and that it would be open to the appellant after obtaining an order of revocation of the grant to show that the will was either not genuine or had not been validly executed. Great reliance was placed in this connection on the judgment of a Division Bench of the Calcutta High Court in *Mokshadayini* v. *Karnadhar Mandal*[1] where the following observations have been made :—

"No question of the genuineness of the will arises for consideration till the Court has decided that the probate must be revoked on one or more of the grounds specified in section 50 of the Probate and Administration Act. The only matter for consideration at this stage is, whether the appellants have made out a just cause for revocation of the probate which was granted without notice to them : *Brindaban* v. *Sureshwar*[2]. The question of genuineness cannot be considered till a case for revocation is made out : *Durgavati* v. *Sourabini*[3]."

The observations relied upon by the appellant were made with reference to the facts of that case and were not intended to be of universal application. As pointed out above, section 263 of the Act also contemplates a case for revocation based on the single ground that the will in respect of which the grant in question was obtained was a forged one. In such a case, whether or not the will was a forged one would be the only question to be canvassed before the Court before the order of revocation could be made.

It was further argued on behalf of the appellant that the appeal should be allowed and the grant revoked on the simple ground, apart from any other considerations, that there had been no citation issued to Girish. In our opinion, this proposition also is much too widely stated. Section 263 of the Act vests a judicial

1. (1914) 19 C.W.N. 1108.
2. (1909) 10 C.L.J. 263 at 273.
3. (1906) I.L.R. 33 Cal. 1001.

discretion in the Court to revoke or annul a grant for just cause. The Explanation has indicated the circumstances in which the Court can come to the conclusion that "just cause" had been made out. In this connection the appellant relied upon clause (*a*) quoted above which requires that the proceedings resulting in the grant sought to be revoked should have been "defective in substance." We are not inclined to hold that they were "defective in substance." "Defective in substance" must mean that the defect was of such a character as to substantially affect the regularity and correctness of the previous proceedings. If there were any suggestions in the present proceedings or any circumstances were pointed out to show that if Girish had been cited he would have been able to enter a caveat, the absence of citation would have rendered those proceedings "defective in substance." It may be that Girish having been found to have been the next reversioner to the testator's estate in case of intestacy and on the assumption that Charu had murdered the testator, Girish might have been entitled to a revocation of the grant if he had moved shortly after the grant of the probate on the simple ground that no citation had been issued to him. The omission to issue citations to persons who should have been apprised of the probate proceedings may well be in a normal case a ground by itself for revocation of the grant. But this is not an absolute right irrespective of other considerations arising from the proved facts of a case. The law has vested a judicial discretion in the Court to revoke a grant where the Court may have *prima facie* reasons to believe that it was necessary to have the will proved afresh in the presence of interested parties. But in the present case we are not satisfied in all the circumstances of the case that just cause within the meaning of section 263 had been made out. We cannot ignore the facts that about 27 years had elapsed after the grant of probate in 1921, that Girish in spite of the knowledge of the grant at the latest in 1933 did not take any steps in his lifetime to have the grant revoked, that there was no suggestion that the will was a forgery or was otherwise invalid and that the will was a registered one and had been executed eight years before the testator's unnatural death. Hence the omission of citations to Girish which ordinarily may have been sufficient for a revocation of the grant was not in the special circumstances of this case sufficient to justify the Court to revoke the grant.

Learned counsel for the appellant made pointed reference to the decision of their Lordships of the Judicial Committee of the Privy Council in *Ramanandi Kuer* v. *Kalawati Kuer*[1]. But that case is an authority for the proposition that where two grounds are taken for revocation of a grant, *viz.*, (1) that persons who ought to have been cited were not cited, and (2) that the will was a forgery, if the first ground is established, the onus is upon the opponents to prove that the will is genuine. That case is no authority for the proposition that in every case where there is a defect in citation, the Court must order a revocation or annulment of the grant. The annulment is a matter of substance and not of mere form. The Court may refuse to grant annulment in cases where there is no likehood of proof being offered that the will admitted to probate was either not genuine or had not been validly executed. But, as rightly pointed out by the lower Appellate Court, in the present case where the validity or genuineness of the will has not been challenged, it would serve no useful purpose to revoke the grant and to make the parties go through the mere formality of proving the will over again. In our opinion, therefore, the omission of citation has had no effect on the regularity of the proceedings resulting in the grant of 1921.

It was next contended that there had been fraudulent concealment of material facts from the Court in the proceedings of 1921, and that therefore the case came within the purview of clause (*b*) of the Explanation quoted above. It was said in this connection that the petition for the grant of probate made in 1921 did not disclose the following material facts:

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1. (1927) 54 M.L.J. 281 : L.R. 55 I.A. 18 (P.C.).

1. That Charu was the murderer of the testator;

2. That the testator had revoked the will or had at least intended to revoke the will; and

3. That a false declaration as regards the value of the property constituting the estate of the deceased testator had been made, that is to say, the applicant for probate had concealed from the Court the true value of the property which was forty lakhs of rupees and not only Rs. 4,75,780 as stated by them.

It is true that in para. 4 of the petition for probate it was only stated that Charu had been found guilty of murder by the High Court and was sentenced to transportation for life and had not till then been released from jail. Our attention was also called to the prayer portion of the petition in which the right of Charu to make an application for probate had been reserved. We can easily dispose of the last suggestion by observing that it was a mere formal reservation. It has no such sinister significance as is attributed to it. It is also true that there is no statement in the application that Charu had murdered the testator. While agreeing with the Judge in the first Court that this was rather disingenuous, we must also hold that that concealment, if it was deliberate, was not material to the case. Even if that statement had been made in the petition, that would have had no effect on the grant of probate to the petitioners who were before the Court. The fact of the murder is relevant only to this extent, that it would affect the legacies in favour of Charu but the other legacies would stand and the will would still be open to probate.

The last allegation relating to concealment is on the question of the value of the property left by the testator by his will. It is not necessary to consider whether if such a concealment had been made out it would have been sufficient to revoke the grant. It is enough to point out that neither of the Courts below has found that the property was really worth anything like forty lakhs of rupees. This ground has not been pressed before us either. It must therefore be held that the appellant has failed to bring his case within the rule of material concealment.

The most serious allegation which could have a determining effect on the grant, if made out, is that the testator had revoked the will. Such an allegation would directly come within the third illustration quoted above. But unfortunately for the appellant he made no attempt to prove his allegation that there was any such revocation. Apart from showing that in or about the year 1917 the testator had entertained the intention either of materially altering his will or of altogether revoking it, there is absolutely no evidence in support of the allegation that the testator actually revoked the registered will in question. For proving that the will had been revoked, it had to be shown that the testator had made another will or codicil or by some writing declared his intention to revoke the will. Such a document is required by section 70 of the Act to be executed in the same manner as a will. Such a revocation could also have been proved, as the section lays down, by burning, tearing or otherwise destroying the will by the testator himself or by some other person in his presence and by his direction, thus clearly indicating his intention of revoking the will. No such proof has been offered in this case. But it was argued that the appellant would have offered such proof after the order of revocation was made by the Court. That would be to put the cart before the horse. If an applicant for revocation of a grant alleges as a ground for such revocation that the testator had revoked the will, he has got to prove that alleged fact at least *prima facie* before he can be entitled to an order of revocation. There may be cases where such a proof may be offered at a later stage where the revocation is founded upon other grounds, for example, where the Court is satisfied that there was substantial defect in the previous proceedings resulting in the grant, or that the grantee had wilfully and without reasonable cause omitted to exhibit an inventory or account; or some such other ground recognized by section 263 as just cause for annulling the grant has been established. It was also argued on behalf of the appellant that even though he may not have proved that the testator had as a matter of fact revoked the will, he is still entitled to an order of revocation on the

ground that he had entertained the intention of revoking the will. No authority had been cited before us in support of this contention. It is open to a person who has made a will at any time to alter or to revoke it; but if he has died leaving a registered will and has not taken any tangible steps to revoke such a will, it is not enough to allege that the testator had at one time entertained the intention of doing so, because such an intention without being translated into action has no effect on the will actually left by him which must be treated as the last will and testament.

It remains to consider the last point, *viz.*, whether the case is within clause (*e*) of the Explanation to section 263. In this connection ground (*f*) in paragraph 23 of the petition quoted above is the only allegation. The omission to submit account is not always synonymous with "wilfully and without reasonable cause" omitting to exhibit accounts. In certain circumstances omission to submit accounts may bring the case within the purview of clause (*e*) aforesaid because the circumstances may tend to show that the omission was wilful and without reasonable cause. We have therefore to consider whether in the circumstances of this case the omission to file accounts has the effect of entitling the appellant to an order of revocation. Under the will the testator intended that Anil Nath Basu should function as the managing executor during his lifetime, as will appear from the relevant portion of paragraph 17 of the will which is as follows:

> "I direct that my executor Babu Anil Nath Basu shall act alone without interference of my other executors in drawing money from or depositing money to any bank, Courts or any other place or places and also in drawing interest of Government Promissory Note, debentures, etc. and in collecting rents of the houses and also in defending and instituting all suits relating to my estate and for the purpose above to sign cheques, rent bills and all papers relating to any suit in connection with my estate".

It would thus appear that Anil Nath Basu was not only the most competent man being a trained lawyer to administer the estate but had also been in terms vested with the power to handle the cash and the accounts by himself without interference by the other executors. He must therefore have handled the incomings and the outgoings and been responsible for keeping true and proper accounts. Whether or not he did so we do not know, because Girish, as already indicated, never made any attempt to question the will or the grant or to call him to account. We have already made reference to Debi Prosad Mitter's correspondence with Anil Nath Basu, the managing executor, bearing on the question of accounts. There is nothing on the record to show what happened on that demand for accounts by Debi Prosad Mitter. The managing executor was alive up till July, 1948 and unfortunately for the appellant, he initiated the revocation proceedings more than a year after his death. If these proceedings had been started in Anil Nath Basu's lifetime, he would have been the best person to inform the Court as to how matters stood with reference to the accounts. The fact remains that no accounts appear from the record of this case to have been submitted by the executors. An application was made before us to take notice of the fact that accounts had been submitted up to date by the 1st respondent who is in charge of the testator's estate. But whether or not the respondent has filed accounts during the pendency of this appeal is wholly irrelevant. We have to determine whether the omission to submit accounts in the circumstances of this case entitles the appellant to have an order of revocation. In the first place, no proper pleading had been made on this part of the case. It has not been alleged that there has been a wilful default without any reasonable cause. Hence no proper foundation was laid in the pleadings for reception of evidence either way. On that ground alone, in our opinion, the appellant must fail on this part of the case. It may also be pointed out that in all the circumstances of this case referred to above, particularly in view of the fact that it was never suggested that the will in question was not genuine or had not been validly executed, it must be held that the proceedings leading up to this appeal have been misconceived. If the appellant has any *locus standi*, his remedy lay not against the will or against the grant of probate, but under the will. But it is not for this Court to advise what the appellant should have done.

As, in our opinion, all the grounds raised on behalf of the appellant for revoking the grant have failed, it is not necessary to go into the question whether Girish had acquiesced in the grant in question and had therefore barred the door against the appellant from raising any further questions about it.

For the reasons aforesaid we uphold the decision of the Court below and dismiss the appeal with costs to the contesting respondent No. 1. There will be no order as to costs in respect of the other respondent.

G.R./K.S. — *Appeal dismissed.*

SUPREME COURT OF INDIA.

[Original Jurisdiction.]

PRESENT:—MEHRCHAND MAHAJAN, *Chief Justice*, S. R. DAS, GHULAM HASAN, BHAGWATI AND VENKATARAMA AYYAR, JJ.

Laxmanappa Hanumantappa Jamkhandi .. *Petitioner**

v.

The Union of India and another .. *Respondents.*

Constitution of India (1950), *Article* 32—*Scope—Right conferred by Article* 265 *if can be enforced under Article* 32.

Article 31, clause (1) of the Constitution must be regarded as concerned with deprivation of property otherwise than by the imposition or collection of tax, and inasmuch as the right conferred by Article 265 is not a right conferred by Part III of the Constitution, it could not be enforced under Article 32.

Ramjilal v. *Income-tax Officer, Mohindegarh,* (1951) S.C.R. 127: 1951 S.C.J. 208 (S.C.).

No relief can be obtained against Income-tax and Excess Profits Tax assessment orders which had become final, (the assessee not having appealed against such orders) by taking proceedings under Article 32 of the Constitution alleging that the attachment and sale of the petitioner's properties under Bombay Land Revenue Code for recovery of the tax assessed was illegal and violated the petitioner's fundamental rights under Articles 31 (1) and 19 (1) of the Constitution.

Petition under Article 32 of the Constitution of India for the enforcement of Fundamental Rights.

B. Sen, I. N. Shroff and *B. P. Singh* for the Petitioner.

M. C. Setalvad, Attorney-General for India, and *C. K. Daphtary,* Solicitor-General for India (*G. N. Joshi, P. A. Mehta* and *P. G. Gokhale,* with them) for Respondents.

The Judgment of the Court was delivered by

Mehrchand Mahajan, C.J.—This is a petition under Article 32 of the Constitution of India for the enforcement of fundamental rights under Articles 31 (1) and 19·(1) (*f*) of the Constitution and for the issue of writs in the nature of *mandamus* and|or *certiorari* and for suitable directions restraining the respondents from interfering with the petitioner's properties in violation of his fundamental rights.

The petition arises in these circumstances. The petitioner, along with his brothers, used to carry on the business of toddy and liquor vendors. In addition to this, one of the brothers used to run a bus service and dealt in cotton and money-lending also. All the brothers owned extensive properties, both agricultural and non-agricultural. Though prior to the assessment year 1926-1927 all the brothers were assessed to income-tax as a Hindu undivided family, since then up to the year 1946 they were assessed separately on account of a partition alleged to have been made between them. In December, 1946,

* Petition No. 492 of 1954. 21st October, 1954.

the Income-tax Officer commenced proceedings against them under section 34 on the ground that the case of partition set up by them was not correct and as a matter of fact there had been no partition between them and they were carrying on business jointly. As a result of these proceedings an assessment under section 34 was made on the four brothers jointly, treating them as an association of persons, for the year 1942-43. Similar assessment proceedings were taken against them in respect of the years 1940-41, 1941-42 and 1943-44.

In December, 1947, the Central Government, under the *bona fide* belief that the petitioner's brothers had made huge profits during the war and had evaded tax, made five references to the Income-tax Investigation Commission under section 5 (1) of the Taxation on Income (Investigation Commission) Act, 1947. Reference No. 175 concerned all the brothers as an association of persons while the other four references related to the brothers individually. As a result of the proceedings before the Investigation Commission, the Commission made a report to the Central Government on the 26th of September, 1952, estimating the amount of escaped income at Rs. 16,79,203 between the years 1940-41 and 1948-49. In pursuance of this report the Central Government passed an order under section 8 (2) of the Taxation on Income (Investigation Commission) Act directing that the assessment proceedings be taken under the Indian Income-tax Act and Excess Profits Tax Act, 1940, as well as under the Business Profits Tax Act, 1947, against Messrs. Jamkhandi Bros. as an association of persons with a view to assess or reassess the income that had escaped assessment according to the report of the Investigation Commission. In accordance with these orders the Income-tax Officer commenced proceedings against Messrs. Jamkhandi Bros. as an association of persons. On the 30th November, 1953, various assessment orders were passed by the Income-tax Officer assessing the petitioner under the Income-tax Act and the Excess Profits Tax Act. Proceedings were then taken against the petitioner for recovery of the tax assessed by the Income-tax Officer and in those proceedings the properties of the petitioner in the District of Belgaum were attached for payment of the dues and one of his properties comprising of about 12 plots of land was sold by public auction under the provisions of the Bombay Land Revenue Code.

On the 20th September, 1954, the present application was preferred under the provisions of Article 32 of the Constitution. It has perhaps been made under the impression that the decision of this Court in *Suraj Mal Mohta* v. *A. V. Viswanatha Sastri and another*[1], has application to the facts and circumstances of this case as well and that relief can be obtained against the assessment orders which have become final, by taking proceedings under Article 32 of the Constitution. In the petition it was alleged that the attachment and sale of the petitioner's properties was illegal and violates the petitioner's fundamental rights under Articles 31 (1) and 19 (1) (*f*) of the Constitution. It was also alleged that the proceedings before the Income-tax Investigation Commission after the coming into force of the Constitution were illegal as being in contravention of Articles 14 and 20 (3) of the Constitution and that in view of the decision of this Court in *Suraj Mal Mohta* v. *A. V. Viswanatha Sastri and another*[1] proceedings under the Taxation on Income (Investigation Commission) Act, 1947, were discriminatory and that the references made by the Central Government under section 5 (1) are not based on a proper classification. It was prayed that this Court may be pleased to issue a writ in the nature of *mandamus* and|or *certiorari* or such other directions as may be appropriate to quash the assessment orders made in pursuance of the order of the Central Government under section 8 (2) of the Taxation on

1. 1954 S.C.J. 611.

Income (Investigation Commission) Act, 1947, and to restrain the respondents from attaching and selling or interfering in any manner with the properties of the petitioner.

From the facts stated above it is plain that the proceedings taken under the impugned Act XXX of 1947 concluded so far as the Investigation Commission is concerned in September, 1952, more than two years before this petition was presented in this Court. The assessment orders under the Income-tax Act itself were made against the petitioner in November, 1953. In these circumstances we are of the opinion that he is entitled to no relief under the provisions of Article 32 of the Constitution. It was held by this Court in *Ramjilal* v. *Income-tax Officer, Mohindergarh*[1], that as there is a special provision in Article 265 of the Constitution that no tax shall be levied or collected except by authority of law, clause (1) of Article 31 must therefore be regarded as concerned with deprivation of property otherwise than by the imposition or collection of tax, and inasmuch as the right conferred by Article 265 is not a right conferred by Part III of the Constitution, it could not be enforced under Article 32. In view of this decision it has to be held that the petition under Article 32 is not maintainable in the situation that has arisen and that even otherwise in the peculiar circumstances that have arisen it would not be just and proper to direct the issue of any of the writs the issue of which is discretionary with this Court. When this position was put to Mr. Sen, the learned counsel for the petitioner, he very fairly, and, in our opinion, rightly conceded that it was not possible for him to combat this position.

For the reasons given above this petition is bound to fail and it is accordingly dismissed with costs.

G.R./K.S. *Petition dismissed.*

SUPREME COURT OF INDIA.

[Criminal Appellate Jurisdiction.]

PRESENT:—S. R. DAS, GHULAM HASAN AND BHAGWATI, JJ.

Kunjilal and another .. *Appellants**

v.

The State of Madhya Pradesh .. *Respondent.*

Criminal Procedure Code (V of 1898)), *section* 403—*Scope and effect—Acquittal of charge under section* 7, *Essential Supplies (Temporary Powers) Act* (1946)—*If bar to subsequent trial and conviction for offences under sections* 392 *and* 332 *of Penal Code (XLV of* 1860) *for causing hurt to police officer who seized the goods and for robbing him of the goods seized—Sections* 236 *and* 237 *of the Criminal Procedure Code—Not applicable.*

At a time when the export of certain essential commodities like rice and ghee was prohibited from Madhya Pradesh to another State, three bullock carts belonging to *K* and *D* (father and son) were crossing the river on the Madhya Pradesh and Uttar Pradesh border.

A Head Constable on receiving information reached the spot and seized the prohibited goods and brought them back to Shahgarh in Madhya Pradesh. On the way *K* and *D* were alleged to have beaten the Head Constable and taken away the property seized. They were accordingly charged under sections 332 and 392, Indian Penal Code, for voluntarily causing hurt to a public servant in the discharge of his duty as such public servant and also for robbing him of the goods seized by him. In appeal by special leave against the order of the High Court maintaining the conviction, it was contended that *K* and *D* were already prosecuted for an offence under section 7 of the Essential Supplies (Temporary Powers) Act, 1946, for exporting the contraband goods and although they were convicted by the Magistrate they were acquitted on appeal and because of that they could not be tried again, for the same offence nor on the same facts for any other offence for which a different charge from the one against them might have been made under section 236 or for which they might have been convicted under section 237.

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1. 1951 S.C.J. 203 : (1951) S.C.R. 127 (S.C.).

* Cr. Appeal No. 73 of 1953. 8th October, 1954.

Held: (i) Neither section 236 (which deals with a case where there is a doubt as to which offence has been committed) nor section 237 (which entitles the Court to convict a person of an offence which he is shown to have committed although he was not charged with it) applies.

(ii) *K* and *D* were not tried again for the same offence as contemplated under section 403 (1) but for distinct offences as contemplated by sub-section (2) of section 403 of the Code of Criminal Procedure.

Accordingly there is no bar to the trial and conviction of *K* and *D* for the offences under sections 332 and 392 of the Indian Penal Code.

Appeal by special leave granted by the Supreme Court by its Order dated the 30th January, 1953, from the Judgment and Order dated the 12th November, 1952, of the High Court of Judicature at Nagpur in Criminal Revision No. 399 of 1951 arising out of the Judgment and Order dated the 26th March, 1951, of the Court of the Magistrate at Sagar in Criminal Case No. 41 of 1950.

Y. Kumar for the Appellants.

B. Sen and *I. N. Shroff* for Respondent.

The Judgment of the Court was delivered by

Ghulam Hasan, J.—This appeal under Article 136 of the Constitution is filed against an order of the High Court of Judicature at Nagpur, passed in revision under the following circumstances:

The two appellants, Kunjilal and Deopal, who are father and son, the latter being aged 17, were prosecuted under section 392 and section 332, Indian Penal Code, in the Court of the Magistrate, Sagar. They were sentenced under the former to 1 year's rigorous imprisonment and under the latter to a fine of Rs. 500 each. Their convictions were upheld on appeal but Kunjilal's sentence was reduced to six months' rigorous imprisonment and Rs. 350 fine, while Deopal was bound over under section 562 of the Code of Criminal Procedure and the sentence of imprisonment was set aside. His fine was reduced under section 332, Indian Penal Code, to Rs. 250. They carried the matter further in revision to the High Court but it was dismissed.

It appears that the export of certain essential supplies such as rice and ghee was prohibited from Madhya Pradesh to another State and any person contravening the prohibition was guilty of an offence under section 7 of the Essential Supplies (Temporary Powers) Act, 1946. Three bullock carts belonging to the appellants and carrying bags of rice and tins of ghee were crossing the river Dhasan on the Madhya Pradesh and Uttar Pradesh border on 1st March, 1949. Head Constable Abdul Samad on receiving information reached the spot, seized the prohibited goods and brought the carts back to Shahgarh in Madhya Pradesh. When they reached the jungle near Shahgarh the two appellants are alleged to have beaten the Head Constable and taken away the property seized to the house of Paltu Bania at Bagrohi. They were accordingly charged under sections 332 and 392, Indian Penal Code, for voluntarily causing hurt to a public servant in the discharge of his duty as such public servant and also for robbing him of the goods seized by him. The appellants denied the offence. They pleaded that the goods were not being exported to Uttar Pradesh but to a place called Baraitha and that they did not beat the Head Constable. The Magistrate who tried the appellants found that both the offences were proved against the appellants. He accepted the prosecution evidence both on the point of beating as well as on the point of exporting the contraband goods. The medical evidence supported the prosecution case. The appellants were accordingly convicted and sentenced as stated above.

The learned Additional Sessions Judge, Sagar, while agreeing with the findings of the Magistrate further found that the story that the carts were being taken to Baraitha which is in Madhya Pradesh was false as the route to Baraitha did not pass through the Dhasan river but lay in quite a different direction.

He, however, held that the carts were caught at the other bank of the river Dhasan after they had crossed the Madhya Pradesh border but the seizure was nevertheless legal. This finding was sought to be made capital of in revision and it was contended that the seizure took place beyond the border of the State of Madhya Pradesh and was therefore illegal. Upon the question whether the carts were within the limits of Madhya Pradesh State when they were actually apprehended there was evidence which was accepted that the carts were seized when they were in the mid-stream and the cart-men requested the Head Constable to let them take the carts on the other side of the river so that they may have their meals. This was allowed and after they had finished their meals, the carts were brought back. Upon this evidence it was held that the carts were captured before they had crossed the Uttar Pradesh border and the seizure was in the circumstances legal and proper. The convictions were maintained but the sentences were reduced as already stated.

In a special leave to Appeal under Article 136, it is not open to the appellants to re-agitate questions of fact and ask the Court to disturb the findings of fact arrived at by Courts below. Those findings must therefore be accepted as binding. It was urged that there was absence of *mens rea* which it is necessary to establish under section 392. It is contended that the appellants honestly believed that they were taking the goods to a place within the State of Madhya Pradesh when they were caught in the mid-stream. This contention is, however, clearly negatived by the finding that the route which the appellants had chosen was not the route which led to Baraitha or any other place within Madhya Pradesh State but actually led to Uttar Pradesh.

It was also contended that the appellants were already prosecuted for an offence under section 7 of the Essential Supplies (Temporary Powers) Act, 1946, for exporting the contraband goods and although they were convicted by the Magistrate they were acquitted on appeal by the Additional Sessions Judge, Sagar, on 31st October, 1952. It is argued upon the strength of this judgment which was admittedly not brought to the notice of the High Court that under section 403 (1) of the Code of Criminal Procedure the appellants who had once been tried for the offence and acquitted could not be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against them might have been made under section 236 or for which they might have been convicted under section 237. Neither section 236 which deals with a case where there is a doubt as to which offence has been committed nor section 237 which entitles the Court to convict a person of an offence which he is shown to have committed although he was not charged with it, applies. Sub-section (2) of section 403 in our opinion furnishes a complete answer to the contention raised on behalf of the appellants. That sub-section reads:

"403 (2).—A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 235, sub-section (1)".

The appellants were not tried again for the same offence as contemplated under section 403 (1) but for a distinct offence as contemplated by sub-section (2). It is true that in order to sustain the charge under sections 332 and 392, Indian Penal Code, the Court had to consider whether the seizure was legal and was made by a public servant in the discharge of his duty but once that was found against the appellants the further question to be determined was as to whether they committed the offence of robbing the Head Constable of the goods lawfully seized and whether they voluntarily caused hurt to him while he was acting in the discharge of his duties as public servant. Upon both these points the finding of the Courts below is concurrent. We hold that there is no substance on this contention. We accordingly dismiss the appeal.

G.R./K.S. ——— *Appeal dismissed.*

SUPREME COURT OF INDIA.

[Criminal Appellate Jurisdiction.]

PRESENT :—S. R. DAS, *Chief Justice*, N. H. BHAGWATI AND SYED JAFER IMAM, JJ.

Pilot U. J. S. Chopra .. *Appellant**

v.

The State of Bombay .. *Respondent.*

Criminal Procedure Code (V of 1898), section 439 (6)—Scope—Accused whose appeal against conviction was dismissed summarily—If entitled to show cause against his conviction when a notice under section 439 (2) is issued to him to show cause why sentence should not be enhanced.

The summary dismissal of the appeal filed by the accused person in the High Court against his conviction was a judgment of conviction by the High Court and was final so far as the accused person was concerned and he could not initiate any further revision application either against his conviction or for reduction of sentence after that dismissal but it was not final so far as the state was concerned and the state was entitled to apply in revision for enhancement of sentence. As soon as the State applied for enhancement and a notice was issued on the accused he became entitled under section 439 (6) to again challenge his conviction. Section 439 (6) gives a new and valuable weapon of defence to an accused person who is placed in fresh jeopardy by reason of an enhancement application having been filed against him and a notice to show cause having been issued to him. There is nothing in sections 369 and 430 to cut down that right. The previous dismissal of his appeal had no bearing on the new situation created by the enhancement application which the Legislature, in enacting section 439 (6), may well and properly have thought to be sufficiently serious to deserve and require a thorough re-examination by the High Court of the conviction itself in this new context. There is nothing in principle which should prevent that sub-section from giving a fresh right to the accused whose appeal or revision has been summarily dismissed to defend himself by challenging his conviction when a notice for enhancement is issued to him.

[Case law discussed].

Appeal from the Judgments and order dated the 26th August, 1953 of the Bombay High Court in Criminal Revision Application No. 518 of 1953 arising out of the Judgment and order dated the 9th December, 1952 of the Court of Presidency Magistrate, Bombay in Case No. 3442|P of 1952.

S. P. Verma, Advocate, for Appellant.

M. C. Setalvad, Attorney-General for India (*Porus A. Mehta and P. G. Gokhale*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Das, J.—The appellant before us was on the 9th December, 1952 convicted by the Presidency Magistrate, 13th Court, Bombay, of an offence under section 66 (b) of the Bombay Prohibition Act (Act XXV of 1949) and sentenced to undergo imprisonment till the rising of the Court and to pay a fine of Rs. 250 or to undergo rigorous imprisonment for one month. The appellant preferred an appeal to the High Court of Judicature at Bombay but his appeal was summarily dismissed by a Bench of that Court on the 19th January, 1953. After the dismissal of that appeal the State of Bombay made a Criminal Revision application to the High Court for enhancement of the sentence. Notice having been issued to the appellant under section 439 (2) of the Code of Criminal Procedure, learned counsel for the appellant claimed the appellant's right under section 439 (6) to show cause against his conviction. This the High Court did not permit him to do. The High Court, however, did not think fit to make any order for enhancement of sentence. On an application made on behalf of the appellant the High Court of Bombay has given leave to the appellant to appeal to this Court and granted a certificate of fitness under Article 134 (1) (c) of the Constitution of India.

*Cr.A. No. 20 of 1954. 25th March, 1955.

The question for our consideration in this appeal is whether the summary dismissal of the appeal preferred by the appellant precluded him from taking advantage of the provisions of section 439 (6) of the Code of Criminal Procedure when he was subsequently called upon to show cause why the sentence imposed upon him should not be enhanced. The question depends for its answer upon a true construction of section 439. That section, so far as it is material for our present purpose, reads as follows:—

"439. (1) In the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 423, 426, 427 and 428 or on a Court by section 338, and may enhance the sentence ; and when the Judges composing the Court of Revision are equally divided in opinion, the case shall be disposed of in the manner provided by section 429.

(2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) ....

(4) ....

(5) Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.

(6) Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub-section (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction."

For a correct appreciation of the real meaning, import and scope of the provisions of sub-section (6) of section 439 it will be necessary to bear in mind its historical background. In England there is no provision for an appeal by the Crown either against an order of acquittal or for the enhancement of sentence. There the person convicted has a right of appeal both against his conviction and the sentence imposed upon him. Under the English criminal procedure, therefore, the question of enhancement of sentence only comes before the Court of Criminal Appeal when there is an appeal by the convicted accused. In this country the provisions relating to the Court's power of enhancement of sentence have undergone radical changes from time to time. Section 407 of the Code of Criminal Procedure, 1861, prohibited any appeal from acquittal. Express power was given to the appellate Court to reduce the sentence (sections 425 and 426) and like power was given to the Sudder Court as a Court of revision (sections 405 and 406). I find no provision in that Code authorising the Sudder Court to enhance the sentence. The Code of Criminal Procedure of 1872, however, by section 272 permitted the Government to file an appeal from acquittal. This was repeated in section 417 of the Code of 1882 which corresponds to section 417 of the present Code. Section 280 of the Code of 1872 expressly authorised all appellate Courts to enhance the sentence. This power of enhancement, however, was taken away from the appellate Courts by section 423 of the Code of 1882 now reproduced in section 423 of the present Code and was vested in the High Court under section 439 of the Code of 1882 to be applied in exercise of its revisional power. This has been continued in our present section 439. This shows that the Legislature thought that this extraordinary power should be exercised only by the High Court and no other Court. A practice, however, appears to have grown up that in cases coming up before it for enhancement of sentence the High Court accepted the conviction as conclusive and proceeded to consider the question of enhancement of sentence on that basis. (See *Emperor* v. *Chinto Bhairava*.)[1] Then came Act XVIII of 1923 which,

1. (1908) I.L.R. 32 Bom. 162.

by section 119, amended section 439 by adding the present sub-section (6) and also amended section 369 by substituting the words "save as otherwise provided by this Code or by any other law for the time being in force, or, in the case of a High Court established by Royal Charter, by the Letters Patent of such High Court, no Court" for the words "No Court other than a High Court" with which the section formerly opened. The results of these amendments were (i) to make the judgment or order of the High Court passed in exercise of its original criminal jurisdiction final which it was not under section 369 as it originally stood and to make this finality subject to the other provisions of the Code or of the Letters Patent of the High Court and (ii) to nullify the practice referred to above and to give a statutory right to an accused person who was threatened with the risk of having the sentence imposed on him by the trial Court or the lower appellate Court enhanced by the High Court in exercise of its revisional jurisdiction *suo motu* or at the instance of the State or in exceptional cases even of any other interested person. Sub-section (6), therefore, confers a new and a very valuable right on the subject which is designed to be a safeguard against the State or other interested person making frivolous revision application for enhancement of sentence. The State or the person interested must, if they ask for an enhancement of sentence, be prepared to face the risk of the accused being altogether acquitted. It is the price or *quid pro quo* which the State or other interested person must be prepared to pay for the right or privilege of making an application for enhancement of sentence. The language used in sub-section (6) does not, in terms, place any fetter on the right conferred by it on the accused. This new right is not expressed to be conditioned or controlled by anything that may have happened prior to the revision application under sub-section (1) for enhancement of sentence. The section quite clearly says that whenever there is an application for enhancement of sentence a notice must issue under sub-section (2) to the accused person to show cause and whenever such notice is issued the accused person must, under sub-section (6), be given an opportunity, in showing cause against enhancement, also to show cause against his conviction. The sub-section does not say that he will have this right to show cause against his conviction only if he has not already done so. If the accused person appealed against his conviction and sentence to an appellate Court not being a High Court and lost that appeal after a full hearing in the presence of his opponent it must be conceded that he has had an opportunity to show cause against his conviction but nobody will contend that that circumstance will prevent him from having another opportunity of showing cause against his conviction and sentence either by a substantive application initiated by himself under sub-section (1) or by way of defending himself when the State or other interested person applies to the High Court in revision under section 439 (1) for enhancement of sentence and a notice is issued on him under section 439 (2). (See *Kala* v. *Emperor*).[1] Enhancement of sentence is undoubtedly an encroachment upon the liberty of the subject and a very serious matter for an accused person and the Legislature may quite properly have thought that whenever an accused person is sought to be laid open to the risk of having his sentence enhanced, the question of the legality and propriety of his conviction should be re-examined by the High Court in the context of this new jeopardy, irrespective of anything that might have happened prior to the application for enhancement of sentence and the issuing of the notice on the accused to show cause. Indeed, there is, in sub-section (6) itself, an indication in that behalf. This sub-section is to operate "notwithstanding anything contained in this section". In some of the

1. A.I.R. 1929 Lah. 584.

decisions (e.g. *Emperor* v. *Jorabhai*,[1] *Crown* v. *Dhanna Lal*,[2] *Emperor* v. *Inderchand*,[3] and *King* v. *Nga Ba Saing*,[4] it has been said that the *non obstante* clause refers only to sub-section (5). I find it difficult to accept this limited construction as correct. Sub-section (5) only says that where an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed. The idea is that if a person has a right of appeal he must first pursue that remedy. In other words, sub-section (5) is a disabling provision. By providing that no proceedings by way of revision shall be entertained at the instance of a person who, having a right of appeal, does not avail himself of it, the sub-section precludes such a person from initiating proceedings by way of revision. When the accused person under sub-section (6) shows cause against his conviction he himself initiates no proceedings but only exercises the right to show cause against his conviction which is given to him because somebody else has taken proceedings against him for enhancement and a notice has been issued on him under sub-section (2). In such a situation the accused person is on the defensive and the act of showing cause against proceedings initiated against him cannot properly be said to be proceedings "at his instance" which the High Court, by sub-section (5), is enjoined not to entertain. Strictly speaking sub-section (6) needs no exemption from sub-section (5). In any event and assuming that the act of showing cause against his conviction under sub-section (6) is tantamount to an application in revision initiated by him and such application is saved from the operation of sub-section (5) by the *non obstante* clause of sub-section (6) I do not see any reason for holding that the *non obstante* clause of sub-section (6) is concerned only with sub-section (5). Although in showing cause against his conviction under sub-section (6) the accused person can urge all that he could do in an appeal, if not more, this act of showing cause is, nevertheless, in form at least, a continuation and indeed an integral part of the proceedings in revision initiated by the Court *suo motu* or by the State or any other interested party. The general rule is that the exercise of revisional power is entirely a matter of discretion which is to be exercised by the High Court not capriciously but on sound judicial principles. Indeed, sub-section (1) itself lays stress on this aspect of the matter by the use therein of the words "in its discretion". The *non obstante* clause may well have been designed to emphasise that the new right conferred by sub-section (6) is a matter of right and does not rest entirely on mere discretion of the Court. Further the *non obstante* clause has a special significance even in a case where the accused person has already had an opportunity, by means of an appeal or revision filed by him in the High Court, to show cause against his conviction. Under sub-section (1) there can be a revision only of the judgment or order of Criminal Courts inferior to the High Court and it does not sanction any revision of the judgment or order of the High Court itself. Therefore, where the accused person has unsuccessfully challenged the legality or propriety of his conviction in an appeal or revision application made by him before the High Court he cannot again initiate a substantive application before the High Court under section 439 (1) of the Code to re-examine his conviction or sentence, for that will be to ask the Court to revise its own previous judgment or order, which the High Court cannot do under section 439 (1). But suppose that the dismissal of the appeal or revision application made by the accused takes place in such circumstances that it still leaves it open to the State or other interested

1. (1926) I.L.R. 50 Bom. 785.
2. (1929) I.L.R. 10 Lah. 241.
3. A.I.R. 1934 Bom. 471.
4. A.I.R. 1939 Rang. 392.

person to apply in revision for enhancement of the sentence and proceedings are initiated by the Court or the State for enhancement of sentence under section 439 (1) and notice is issued on the accused under section 439 (2), there is nothing in sub-section (6) which, in terms, prevents the accused, in that situation, to again show cause against his conviction and sentence. The only argument that may, in those circumstances, be advanced with some semblance of plausibility is that to let the accused person to again challenge his conviction or sentence under sub-section (6) is to cut across the provisions of sub-section (1) and in effect to permit the accused to ask the High Court to revise its previous order, although no substantive application could be initiated by him under sub-section (1). It may well be that the *non obstante* clause in sub-section (6) was also designed to negative such an argument. Although ordinarily no substantive application can be initiated by an accused person, whose appeal or revision application has once been dismissed by the High Court, for revision or review of that order of dismissal, I can find no difficulty in construing and reading section 439 (6) as giving to the accused person, who is faced with the risk of having his sentence enhanced, a second opportunity to do what he had previously failed to do. In other words, I see no incongruity in the Legislature giving a new right of revision to the accused person as a weapon of defence in the context of a new offensive taken by the State against him. Even if the act of showing cause under sub-section (6) is to be regarded as a revision, there was nothing to prevent the Legislature, in the interest of the liberty of the subject, to provide for a limited right of revision of the judgment or decision or order of the High Court itself. In my judgment that is what the Legislature has done by adding sub-section (6) to section 439 and the *non obstante* clause is intended to meet and repel the objection that may possibly have been taken on the score that, under sub-section (1), there can be no revision by the High Court of its own order. In my opinion, so long as proceedings may be taken against the accused person for enhancement of his sentence and so long as notice may be issued on him to show cause against enhancement, so long must he have, in showing cause against enhancement of sentence, the right, under sub-section (6), to show cause against his conviction, irrespective of anything that may have happened previously. That is how I read the sub-section. Indeed, in *Emperor* v. *Mangal Naran*,[1] McLeod, C.J., went further and expressed the view that if, after an appeal had been heard on its merits and dismissed, a notice to enhance sentence was issued, the accused would still have the right to show cause against his conviction although any attempt to set aside his conviction would not have much chance of success. For reasons to be stated hereafter I would rather say that in such a situation no application for enhancement would lie at all and that consequently no question would arise of the accused person exercising his right under sub-section (6). This aspect of the matter that I am trying to indicate and emphasise does not appear to have been sufficiently adverted to in the subsequent decisions of the different High Courts in India except in one decision of a Full Bench of the Lahore High Court. It will be convenient at this stage to refer to those decisions.

In *Emperor* v. *Jorabhai*,[2] the accused person was convicted by the Sessions Judge. He preferred an appeal to the High Court and a Bench of the High Court dismissed the appeal on merits after full hearing of both sides after notice of appeal had been served on the State. After the delivery of the judgment an oral application was made to the Bench by the Government pleader for the enhancement of the sentence. Notice was issued to the ac-

1. (1924) I.L.R. 49 Bom. 450.
2. (1926) I.L.R. 50 Bom. 785.

cused under section 439 (2) of the Code. The accused claimed the right, under sub-section (6) to challenge his conviction. It was held by Fawcett and Madgavkar, JJ., that section 439 (6) did not justify what would be tantamount to a rehearing of the appeal on merits.

In the case of *Ramlakhan Chaudhury* v. *Emperor*,[1] the accused's appeal had been previously dismissed after a full hearing and following the decision in *Emperor* v. *Jorabhai*,[2] it was held that the accused could not, under section 439 (6), challenge the correctness of his conviction for the second time while showing cause against enhancement of sentence. The same principle has been extended to cases where the appeal of the accused person had been previously dismissed by the High Court summarily but after hearing the accused or his advocate. (See *Emperor* v. *Batubai*,[3] *Emperor* v. *Haji Khamoo*,[4] *King* v. *Nga Ba Saing*,[5] *Emperor* v. *Naubat*,[6] to cases where the jail appeal of the accused had previously been dismissed summarily without hearing the accused or his advocate (see *Emperor* v. *Koya Partab*,[7] *Emperor* v. *Abdul Qayum*,[8] *Emperor* v. *Debi Charan*,[9] and *State* v. *Bhavani Shankar*,[10] and to cases of dismissal of revision petition filed by the accused after hearing the advocate [see In re *Saiyed Anif Sahib*,[11] *Emperor* v. *Sher Singh*,[12] *Crown* v. *Dhanna Lal*,[13]] and also to the case of an accused whose revision petition has been summarily dismissed [see *Emperor* v. *Inderchand*[14]]. It has been held that for the purposes of section 439 (6) it makes no difference whether the judgment or order of dismissal was made by the High Court in appeal or in revision, or whether the appeal or revision was dismissed summarily or after a full hearing on notice to the State or other interested party and that any dismissal of the appeal or revision prevents the accused person from availing himself of the benefit of section 439 (6). In two cases *Emperor* v. *Luckman*,[15] and *Emperor* v. *Shidoo*,[16] the Sind Court took up an intermediate position that the accused person whose appeal had been dismissed summarily or after full hearing could not challenge his conviction for the second time except to the extent that the conviction was not founded on legal evidence or was manifestly erroneous. In other words, he could only go up to what was ordinarily permitted in a revision. These two decisions appear to me, with respect, to be illogical and I need say no more about them. In the other cases noted above it has been quite definitely held that the accused person whose appeal or revision application has been previously dismissed, summarily or after a full hearing, is not entitled, when called upon to show cause why the sentence should not be enhanced, to question the correctness of his conviction for the second time. In other words, the previous dismissal, according to these decisions, is an adjudication by the High Court of the correctness of his conviction and on the principle of finality of judgment embodied in sections 369 and 430 of the Code of Criminal Procedure that adjudication cannot be called in question under section 439 (6). It has been pointed out in several cases [*Crown* v. *Dhanna Lal*,[13] *Emperor* v. *Inderchand*[14] and *King* v. *Nga Ba Saing*,[5]] that sub-section (6) opens with the words "notwithstanding anything contained *in this section*" and not with the words "notwithstanding anything contained in this Code" and from this the inference has been drawn that while the sub-section is to operate

1. (1931) I.L.R. 10 Pat. 872.
2. (1926) I.L.R. 50 Bom. 785.
3. A.I.R. 1927 Bom. 666.
4. A.I.R. 1936 Sind. 233.
5. A.I.R. 1939 Rang. 392.
6. I.L.R. (1945) All. 527.
7. (1930) I.L.R. 54 Bom. 822.
8. A.I.R. 1933 All. 485.
9. A.I.R. 1942 All. 339.
10. I.L.R. (1952) 2 Raj. 716.
11. A.I.R. 1925 Mad. 993.
12. (1927) I.L.R. 8 Lah. 521.
13. (1929) I.L.R. 10 Lah. 241.
14. A.I.R. 1934 Bom. 471.
15. A.I.R. 1927 Sind. 39.
16. A.I.R. 1929 Sind. 26.

notwithstanding the provisions of sub-section (5) it cannot override the other provisions of the Code, and, therefore, the operation of sub-section (6) is conditioned or controlled by the principle of finality of judgment embodied in section 369 and section 430. Some learned Judges have expressed the view (See In re *Saiyed Anif Sahib,*[1] *Crown* v. *Dhanna Lal,*[2]) that the words "unless he has already done so" are to be read in section 439 (6), for this is to be implied from the presumption of finality. In some cases [see *Emperor* v. *Sher Singh*[3] and *Ram Lakhan* v. *Emperor*[4]] the decision has been placed also on the ground of the inherent incapacity of one Judge of the High Court to reconsider the decision of another Judge of that Court. It is necesary to examine these grounds a little closely to ascertain their validity.

In order to appreciate the true meaning and exact scope of sections 369 and 430 on which the argument of finality of judgment is founded it is necessary to keep in view the general scheme of the Code. Part VI of the Code deals with "Proceedings in Prosecutions". Chapter XV lays down the jurisdiction of the Criminal Courts in Inquiries and Trials. I pass over Chapters XVI to XVIII. Chapter XIX prescribes rules for the framing and joinder of charges. Chapters XX to XXIII deal with different kinds of trials, e.g. trial of summons cases, warrant cases, summary trials and trials before High Courts and Courts of Session. Chapter XXIV contains general provisions as to Inquiries and Trials. Mode of taking and recording evidence is prescribed by the sections grouped together in Chapter XXV. Then comes Chapter XXVI which is headed "Of the Judgment." Section 369 is one of the sections included in this chapter. Chapter XXVII provides for the submission of death sentences for the confirmation of the High Court. Rules relating to the execution, suspension, remission and commutations of the sentences are to be found in Chapters XXVIII and XXIX. Part VI ends with Chapter XXX which is not material for our present purpose. Part VII deals with "Appeal, Reference and Revision". Chapter XXXI is concerned with Appeals and we find section 430 in this chapter. Chapter XXXII provides for reference and revision, section 439 being one of the sections included in this chapter. In view of the scheme summarised above, there can be no manner of doubt that the provisions of the sections collected in chapter XXVI are concerned with judgments pronounced by the trial Court. This conclusion is certainly reinforced by the language of some of these sections. Thus section 366 which is the very first section in this chapter refers to "The judgment in every trial in any Criminal Court of *original jurisdiction:*" Section 367 provides what must be contained in "every such judgment", that is to say judgment in an original trial. Section 369 runs as follows:

"369. *Court not to alter Judgment.*—Save as otherwise provided by this Code or by any other law for the time being in force or, "in the case of a High Court by the Letters Patent or other instrument constituting such High Court", no Court, when it has signed its judgment, shall alter or review the same, except to correct a clerical error."

The opening words "save as otherwise provided by this Code........constituting such High Court" were added by section 119 of the Amending Act XVIII of 1923 and were further adapted by Adaptation of Laws Order, 1950. There can be no question that the finality embodied in this section is only in relation to the Court which pronounces the judgment, for it forbids the Court, after *it* has signed *its* judgment, to alter or review the same. In other words, after pronouncing the judgment the Court that pronounces it becomes *functus officio*. There is indication in the Code itself that the purpose of section 369 is not to prescribe a general rule of finality of all judgments of all

1. A.I.R. 1925 Mad. 993.
2. (1929) I.L.R. 10 Lah. 241.
3. (1927) I.L.R. 8 Lah. 521.
4. (1931) I.L.R. 10 Pat. 872.

Criminal Courts but is only to prescribe finality for the judgment of the trial Court so far as the trial Court is concerned. That this section does not, by itself, apply to the judgment of an appellate Court is quite obvious, because if it did, there would have been no necessity for enacting section 424 specifically making the rules contained in Chapter XXVI, which includes section 369, applicable to the judgment of any appellate Court other than High Court, nor for again prescribing by section 430 a rule of finality for judgments and orders passed by an appellate Court. It, therefore, follows that while, subject to the other provisions of the Code or any other law and of the Letters Patent, the finality of section 369 attaches to the judgments pronounced by all trial Courts including the High Court in the exercise of its original criminal jurisdiction it certainly has no bearing on the question of finality of appellate judgments which is specifically provided by section 430 of the Code. Again, the rule of finality embodied in section 369 cannot, in terms, apply to the orders made by the High Court in exercise of its revisional jurisdiction, for section 442 of the Code which requires the result of the revision proceedings to be certified to the Court by which the finding, sentence or order revised was recorded or passed refers to it as its "decision or order" and not "judgment". It is significant that section 425 which requires the result of appeal to be certified to the lower Court refers to it as its "judgment or order". All these considerations herein alluded to quite clearly establish that section 369 cannot in any manner control section 439 (6). In any case, section 369 is "subject to the other provisions of the Code" and I see no reason why section 439 (6) should not be regarded as one of such other provisions. It cannot be overlooked that the words "subject to the other provisions of the Code, etc." were introduced into section 369 at the same time as sub-section (6) was added to section 439. As I read the new sub-section, it is a substantive statutory right conferred on the subject and full effect should be given to it unless there is any insuperable difficulty in the way of doing so. If section 369 were susceptible of as wide a meaning as is read into it, namely, that it applies to all judgments of all Courts, original, appellate or revisional, I would, in that case, hold that that meaning must be taken as cut down, by reason of the words "subject to the other provisions of the Code, etc." by the mandatory provisions of section 439 (6). In other words, section 439 (6) must be read as controlling section 369 rather than the other way about. Finally, section 369 being subject to the other provisions of the Code must be read as subject to section 430 and as the finality enshrined in the latter section does not attach to decisions or orders made in revision by reason of Chapter XXXII being expressly excepted from its operation, the rule of finality embodied in section 369, even if it be as wide as it is contended to be, cannot affect cases provided for in Chapter XXXII.

I now pass on to section 430 which is also relied on as furnishing a principle of finality which is supposed to control the operation of section 439 (6). Section 430, in terms, applies to "judgments and orders" passed by an appellate Court. It has no application to "decisions or orders" made by the High Court in revision. It has been contended that the exception made in section 430 in respect of cases provided for in Chapter XXXII only exempts the judgments or orders of an appellate Court other than a High Court from the rule of finality embodied in section 430, because they are made revisable by the High Court under section 439 (1). Section 439 (1) does not contemplate or permit judgments or orders made by the High Court, in exercise of its original or appellate criminal jurisdiction to be revised by the High Court. As, therefore, the appellate judgments or orders of the High Court cannot, under section 439 (1), be made the subject-matter of any revision application, such appellate judgments or orders did not fall within the exception made

in section 430 and were accordingly left subject to the rule of finality embodied therein. Two answers occur to me. If the effect of the new sub-section (6), as I have already explained, is to confer a new right on an accused person notwithstanding anything contained in section 439 (1), that is to say, if sub-section (6) is read, as I think it should be, as a statutory provision expressly making the judgment or decison or order of the High Court passed in exercise of its appellate or revisional jurisdiction subject, for the purpose of the protection of an accused person whose appeal or revision had been previously dismissed, to re-examination by the High Court only as and when he is subsequently faced with an application for enhancement of sentence, then such judgment, decision or order of the High Court does, as a result of section 439 (6), become the subject-matter of a case provided for in Chapter XXXII of the Code. In other words, the scope of Chapter XXXII having been enlarged by the addition of sub-section (6) to section 439, the scope of the exception to section 430 must also stand enlarged so as to include within the exception whatever, after the amendment of section 439, may come within Chapter XXXII and, therefore, cases now coming within that chapter must stand free from the rule of finality embodied in section 430. The other answer is to be found in two of the decisions of the Allahabad High Court, namely, *Emperor* v. *Abdul Qayum* (supra)[1] and *Emperor* v. *Debi Charan*,[2] where it has been held that section 430 by its own terms saves the revisional power of the High Court to enhance the sentence. In each of these cases the jail appeal filed by the accused had been dismissed by the High Court summarily. If the rule of finality of appellate judgments does not attach to the summary dismissal of the jail appeal by the High Court so as to prevent the State from invoking its revisional power to enhance the sentence, surely the accused's right to show cause against his conviction under section 439 (6), which is consequential and arises only upon a rule for enhancement being issued under section 439 (2) and is, therefore, a part of the revisional proceedings for enhancement of sentence, must, on a parity of reasoning be also free from the same principle of finality. It, therefore, follows that section 439 (6) is not, in terms, controlled by section 369 or section 430. Whether the sub-section is controlled by the general principle of finality of judgments and if so to what extent are different questions which will be discussed later.

The second ground on which some of the decisions rest, namely, the inherent incapacity of one Judge of the High Court to reconsider the decision of another Judge of the High Court may easily be disposed of. The theory of inherent incapacity must give way to the statutory capacity conferred by section 439 (6). If on a true construction a statute states, expressly or by necessary intendment, that one Judge or one Bench shall have jurisdiction and power to decide something, the theory of inherent incapacity of such Judge or Bench cannot be invoked to prevent the exercise of such jurisdiction and power merely on the ground that the decision which may be arrived at in exercise of this new jurisdiction or power may run counter to the previous decision arrived at by another Judge or Bench in exercise of another jurisdiction or power. I see no reason why section 439 (6) may not be read as a provision which, by necessary implication, enables the High Court to re-examine its own previous order on the happening of certain contingencies, namely, upon the accused person, whose appeal or revision has been dismissed, being faced with the risk of having his sentence enhanced and a notice being issued to him for enhancement.

1. A.I.R. 1933 A. 485. 2. A.I.R. 1942 All. 339.

To reinforce the argument that section 439 (6) is controlled by sections 369 and 430 reference has been made to section 423 (2) and it has been contended, on the authority of various decisions, that the right given by section 439 (6) is not absolute, but is controlled by the provisions of section 423 (2), which lay down some limitations in the matter of appeal from convictions in a jury trial. Even on that topic some learned Judges have taken divergent views. It is not necessary, on this occasion, to express any opinion on that question and I reserve my right to examine the position as and when an occasion may arise in future. Even if section 439 (6) is controlled by section 423 (2), that circumstance certainly does not indicate when and under what circumstances the right under section 439 (6) may be availed of. In any case, that consideration has no bearing on the argument of finality of judgments sought to be founded on sections 369 and 430.

It will be convenient at this stage to refer to the decision of a Full Bench of the Lahore High Court in *Emperor* v. *Atta Mohammad*[1] and to deal with the argument founded on and developed from some of the reasonings adopted by the learned Judges constituting that Full Bench. In that case the revision application of the accused had been dismissed *in limine* by the High Court. Subsequently the Crown applied for enhancement of sentence. Notice having been issued under sub-section (2) of section 439 the accused person claimed the right, under sub-section (6), to show cause against his conviction in spite of the fact that his revision application had been dismissed. The Advocate for the Crown relied on the cases referred to above and contended that the order of dismissal of the revision application by the High Court was final as regards the correctness of the conviction, that that order could not again be revised by the High Court, that the accused was no longer entitled to challenge his conviction and that it made no difference that his revision petition had been dismissed in limine. The Full Bench overruled the earlier decision of the Court in *Crown* v. *Dhanna Lal*,[2] (supra) and held that the accused was, in the circumstances of the case, entitled to show cause against his conviction, notwithstanding the fact that his application for revision had been dismissed *in limine*. The reasoning adopted by Blacker, J., was shortly as follows: That an order dismissing a revision petition *in limine* is an order made under section 435 and not under section 439; that such an order is not a judgment and, therefore, the principle of finality embodied in section 369 does not apply to such an order, because such a dismissal only meant that the Judge saw no adequate grounds disclosed in the petition or on the face of the judgment for proceeding any further; that, in the picturesque language of the learned Judge, in such a dismissal "there is no finding or decision unless it can be called a decision to decide to come to no decision"; that the jurisdiction exercised by the Court under section 439 (6) was appellate jurisdiction and that an order of acquittal thereunder did not amount to a review of an order of dismissal under section 435; and finally that if the order under section 435 was a judgment or if an order of acquittal under section 439 (6) was a review of such judgment, such review was not barred by section 369, because of the saving provisions with which the section begins. Mahajan, J., as he then was, put in the forefront of his judgment the view that section 439 (6) which was introduced by amendment in 1923 gave a new and unlimited right to the subject; that the Judge hearing the application for enhancement was bound to go into the facts to satisfy himself as to the correctness of the conviction; that the exercise of revisional jurisdiction was a mere matter of favour and a dismissal *in limine* of such application amounted only to a refusal to look into the record and was in no sense a judgment. Ram Lall,

1. (1943) I.L.R. 25 Lah. 391. 2. (1929) I.L.R. 10 Lah. 241.

J., did not deliver any separate judgment but concurred generally with the other learned Judges.

It will be noticed that this decision of the Lahore High Court rests mainly on two grounds, namely, (1) that in a dismissal of a revision application *in limine* there is no finding or decision at all and that it is nothing more than a refusal to send for the records or to look into the matter and is, therefore, not a judgment, and (2) that in any case, section 439 (6) gives a new statutory right to the accused person to challenge the legality or propriety of his conviction, although his previous application for revision of the order of the lower Court had been dismissed *in limine* and that such a review of that dismissal order is not barred by section 369 because of the saving provision at the beginning of that section. The Full Bench expressly declined to express any opinion as to the effect of dismissal of an appeal on the right given by sub-section (6). The principle of the first ground of the Lahore Full Bench decision has, however, been extended by the Rajasthan High Court in *The State* v. *Bhawani Shankar*,[1] (supra) to a case where the respondent's jail appeal had been summarily dismissed. According to Wanchoo, C.J., the accused, whose jail appeal had been dismissed summarily, was in the same position as the accused, whose revision petition had been dismissed *in limine*, for he too could not be said to have had an opportunity of showing cause against his conviction. The learned Chief Justice, however, did not desire to go further and expressed the view that if an appeal were dismissed summarily but after hearing the party or his pleader the accused could not claim to have a second opportunity to challenge his conviction under section 439 (6), because in that case he had been heard and, therefore, had had an opportunity to show cause against his conviction when his appeal had been summarily dismissed.

It will be recalled that in *Emperor* v. *Jorabhai*[2] (supra) and the other cases which followed it it was said that for the purposes of determining the applicability of section 439 (6) it made no difference in principle whether the proceeding filed by the accused which had been dismissed was an appeal or a revision or whether the dismissal was summary or after a full hearing and that in none of such cases could the accused person claim a second opportunity to question the legality or propriety of his conviction when he was subsequently called upon to show cause why the sentence passed on him should not be enhanced. In the Lahore Full Bench case and the Rajasthan case referred to above, a distinction has, however, been made between a summary dismissal and a dismissal after a full hearing of the appeal or revision filed by the accused. In my judgment there is a substantial distinction between these two kinds of dismissals as regards their effect on the rights of accused persons as I shall presently indicate.

I am, however, unable to accept the argument adopted by the Lahore Full Bench that a summary dismissal of a revision application filed by the accused must be regarded as an order made under section 435 and not one under section 439, that such a summary dismissal is nothing more than a refusal on the part of the High Court to go further or to look into the application and that in such a dismissal there is no finding or decision at all. Far less am I able to accede to the proposition that a summary dismissal of a jail appeal also stands on the same footing. Sections 421, 435 and 439 undoubtedly vest a very wide discretion in the Court. Discretion, as Lord Halsbury, L.C., said, in *Sharp* v. *Wakefield*,[3] means sound discretion guided by law. It must be governed by rules of reason and justice and not according to private opinion; according to law and not by humour or caprice. It

1. I.L.R. (1952) 2 Raj. 716.
2. I.L.R. (1926) 50 Bom. 785.
3. L.R. (1891) A.C. 173 at p. 179.

must not be arbitrary, vague and fanciful but must be legal and regular. This discretion is given to the High Court for the purpose of dealing with and disposing of the proceeding brought before it and not for not deciding it. The primary and paramount duty of the Court is to decide the appeal or revision and it is to exercise its discretion in so deciding it. In deciding the appeal or revision the High Court may choose which of its powers it will exercise if the circumstances of the case call for such exercise. In a clear case, apparent on the grounds of appeal or revision or on the face of the judgment appealed from or sought to be revised it may come to the conclusion that the case has no merit and does not call for the exercise of any of its powers, in which case it may dismiss it summarily. If, however, it has any doubt, it may call for the record or may admit it and issue notice to the respondent and decide it after a full hearing in the presence of all parties. But decide it must at one stage or the other. The discretion conferred on the High Court does not authorise it to say that it will not look at the appeal or the revision. The court's bounden duty is to look into the appeal or revision and decide it, although in the process of arriving at its decision it has very wide discretion. When the Court summarily dismisses an appeal whether without hearing the accused or his pleader as in the case of a jail appeal or after hearing the accused or his pleader but before issuing any notice to the respondent as in an appeal presented by the accused or his pleader, the Court does decide the appeal. It is indeed a very serious thing to say that sections 421, 435 or 439 give the Court a discretion not to decide the appeal or revision brought before it and I, for one, am not prepared to countenance and much less encourage such an idea. In my judgment a summary dismissal of an appeal or revision does involve an adjudication by the High Court, just as a dismissal after a full hearing does. The only difference, as we shall presently see, is as to the respective nature, scope and effect of the two adjudications.

It has been said that when an appeal or revision is dismissed after a full hearing by the High Court the judgment of the lower Court merges in the High Court judgment and the High Court judgment replaces the judgment of the lower Court and becomes the only operative judgment but that when the appeal or revision is summarily dismissed by the High Court there is, in such a dismissal, no finding or decision which can replace the judgment of the lower Court. It is, therefore, said that there can be no showing cause against his conviction under sub-section (6) in the first case, for it will involve a revision of the High Court's decision but the position will be otherwise in the second case where the dismissal was summary. This argument appears to me to be untenable and fallacious. Section 425 of the Code requires that whenever a case is decided on appeal by the High Court under Chapter XXXI it must certify its judgment or order to the Court by which the finding, sentence or order appealed against was recorded or passed and that that Court shall thereupon make such orders as are conformable to the judgment or order of the High Court and that, if necessary, the record shall be amended in accordance therewith. Likewise, section 442 requires that when a case is revised under Chapter XXXII by the High Court, it shall, in the manner provided by section 425, certify its decision or order to the Court by which the finding, sentence or order revised was recorded or passed and that that Court shall thereupon make such orders as are conformable to the decision so certified and that, if necessary, the record shall be amended in accordance therewith. This certificate is sent in every case, whether the appeal or revision is disposed of summarily or after a full hearing. Where an appeal or revision is disposed of after a full hearing on notice to the respondent and allowed wholly or in part it becomes *ex facie* obvious that the

judgment appealed against or sought to be revised has been altered by the judgment or decision of the High Court on appeal or revision and a note is made in the record of this alteration. But when an appeal or revision is dismissed after full hearing and the sentence is maintained there is outwardly no change in the record when the certificate is sent by the High Court but nevertheless there is an adjudication by the High Court. In the first case it is judgment of a acquittal or reduction of sentence and in the second case it is a judgment of conviction. Likewise, when an appeal or revision is summarily dismissed, such dismissal maintains the judgment or order of the lower Court and a note is made of such dismissal in the record and in the eye of the law it is the judgment of the High Court that prevails. To the uninstructed mind the change may be more easily noticeable in the first case than in the other two cases but on principle there is no difference. I can see no reason for holding that there is a merger or replacement of judgment only in the first two cases and not in the last one. In my opinion, it makes no difference whether the dismissal is summary or otherwise, and there is a judgment of the High Court in all the three cases.

It is at once urged that if the summary dismissal of an appeal or revision is also a judgment then the rule of finality prescribed by sections 369 and 430 will at once apply to it and a cunning accused may by putting up an obviously untenable appeal or revision and procuring an order of summary dismissal of it, prevent the State or any other interested party from making an application for enhancement of the sentence. The apprehension, to my mind, is unfounded for reasons more than one. When an appeal or revision is filed by an accused person he sets out his grounds in detail, challenging both his conviction and sentence. From the very nature of things he does not raise any question of enhancement of the sentence. At that stage no notice or rule having been issued the respondent is not before the Court to raise the issue of enhancement. So the summary dismissal only confirms the conviction and decides that the Court sees no ground for reducing the sentence. It is in no sense a decision that the sentence should not be enhanced for that issue was not before the Court at all and so it has been said, I think rightly, in several cases, [e.g., In re *Saiyed Anif Sahib* (supra)], *Emperor* v. *Jorabhai*[1] (supra) and *Emperor* v. *Inderchand*[2] (supra)]. The fact the High Court simply dismisses the appeal or revision summarily without issuing notice on the accused under section 439 (2) for showing cause against enhancement is a clear indication that the High Court has not considered the question of enhancement. It is true that the rule of finality prescribed by section 430 applies to the appellate judgment of the High Court, subject to the exception regarding cases falling within Chapter XXXII. It is also true that although the revisional power is not expressly or in terms controlled either by section 369 or section 430, the general principle of finality of judgments attaches to the decision or order of the High Court passed in exercise of its revisional powers. But this finality, statutory or general, extends only to what is actually decided by the High Court and no further. When an appeal or revision by the accused is allowed after a full hearing on notice to the respondent the conviction and sentence must be regarded as having been put in issue and finally decided. When the accused person in the presence of the State claims an acquittal or reduction of his sentence, the State ought then and there to apply for enhancement of sentence and its failure to do so cannot but be regarded as abandonment of the claim. The acceptance by the High Court of the appealor revision on notice to the respondent and after a full hearing is, therefore, nothing less than a judgment of acquittal or a judgment for reduction of sentence. On the other hand the dis-

1. (1926) I.L.R. 50 Bom. 783. 2. (1934) 36 Bom.L.R. 954.

missal by the High Court of an appeal or revision after such a full hearing amounts to a judgment of conviction. In both cases the judgment is final as regards both the accused and the respondent as regards the conviction as well as the sentence in all its aspects, namely, reduction or enhancement. In that situation no further question of revision can arise at the instance of either party. There can be no further application by the accused challenging his conviction or sentence. Nor can there be any further application by the State for enhancement of the sentence, for that question could have been and should have been raised when the accused person in the presence of the respondent prayed for acquittal or reduction of sentence and not having then been raised it cannot be raised subsequently and consequently no question can arise for the exercise of right by the accused under section 439 (6). This result is brought about not by any technical doctrine of constructive *res judicata* which has no application to criminal cases but on the general principle of finality of judgments. The summary dismissal of an appeal or revision by the accused, with or without hearing him or his pleader but without issuing notice to the respondent is, so far as the accused is concerned, a judgment of conviction and confirmation of his sentence and he can no longer initiate revision petition against his conviction or sentence. The judgment or decision is a final judgment *qua* the accused person, for otherwise he could go on making successive appeals or revision applications which obviously he cannot be permitted to do. But the State or other interested person who has not been served with any notice of the appeal or revision cannot be precluded, by the summary dismissal of the accused's appeal or revision, from asking for enhancement, for in that situation the State or the complainant not being present the question of enhancement was not in issue before the Court and the summary dismissal cannot be regarded as an adjudication on the question of enhancement. That question not having been put in issue and not having been decided by the High Court, the finality attaching to the summary dismissal as against the accused does not affect the position. This, I apprehend, is the true distinction between a summary dismissal of an appeal or revision and a dismissal of it after a full hearing. The cases of *Emperor* v. *Jorabhai*[1] (supra) and the other cases following it overlooked this vital distinction as also its effect on the new statutory right conferred on the accused person by section 439 (6) and they cannot be accepted as correct decisions. In those cases where the appeal or revision filed by the accused had been dismissed after a full hearing in the presence of the State and where there was no application by the State or other interested party for enhancement of sentence during the pendency of that appeal or revision it should have been held that the dismissal must be regarded as a judgment which was final as against both parties on both points; conviction and sentence and there could be no further application for the enhancement of sentence and consequently no question of the accused having a further opportunity of showing cause against his conviction could arise. In the cases where the appeal or revision filed by the accused had been summarily dismissed without notice to the respondent, it should have been held that although such dismissal was final as against the accused it did not preclude the State or the complainant, who was not a party to the dismissal, from applying for enhancement of sentence and that as soon as an application for enhancement was made subsequently and a notice was issued to the accused, the latter, faced with the risk of having his sentence enhanced, at once became entitled, under section 439 (6), in showing cause against the enhancement of sentence, also to show cause against his conviction. The Lahore Full Bench case has decided, *inter alia*

1. (1926) I.L.R. 50 Bom. 753.

that while the dismissal of the accused's revision application *in limine* does not prevent the State from subsequently applying for enhancement of the sentence, section 439 (6) gives the accused a fresh right to challenge his conviction when a notice for enhancement is issued to him. That part of the decision may well be sustained on this ground as explained above but, with great respect, I do not agree with their view that the accused in that case had the second right because the summary dismissal of his revision was not a judgment at all or was not final even as regards him. The Rajasthan High Court's decision in so far as it extended the principle to the dismissal of a jail appeal without hearing the accused or his pleader under section 421 may also be supported on the ground I have mentioned. A Bench of the Lahore High Court in *The Crown* v. *Ghulam Muhammad*,[1] has held that where the accused's revision application had been dismissed on notice to the respondent and after a full hearing and the State subsequently applied for enhancement of sentence, the accused person could again show cause against his conviction. With great respect I think that the better reasoning would have been to say that such a dismissal of the revision after a full hearing was a judgment final against both parties on both points of conviction and sentence and that as the State did not, during the pendency of that revision, apply for revision it had, after that dismissal which became a final judgment, no right subsequently to apply for enhancement of sentence and consequently no notice under section 439 (2) could issue and no question could arise for the accused person asserting his right under section 439 (6).

For reasons discussed above I have to hold that the summary dismissal of the appeal filed by the appellant in the High Court was a judgment of conviction by the High Court and was final so far as the appellant was concerned and he could not initiate any further revision application either against his conviction or for reduction of sentence after that dismissal but that it was not final so far as the State was concerned and the State was entitled to apply in revision for enhancement of sentence. For reasons already stated I must further hold that as soon as the State applied for enhancement and a notice was issued on the appellant he became entitled under section 439 (6) to again challenge his conviction. As I have said this sub-section gives a new and valuable weapon of defence to an accused person who is placed in fresh jeopardy by reason of an enhancement application having been filed against him and a notice to show cause having been issued to him. I find nothing in sections 369 and 430 to cut down that right. The previous dismissal of his appeal had no bearing on the new situation created by the enhancement application which the Legislature, in enacting section 439 (6), may well and properly have thought to be sufficiently serious to deserve and require a thorough re-examination by the High Court of the conviction itself in this new context. There is nothing in principle that I can see which should prevent that sub-section from giving a fresh right to the accused whose appeal or revision has been summarily dismissed to defend himself by challenging his conviction when a notice for enhancement is issued to him.

In my judgment, for the reasons stated above, this appeal should be allowed and the matter should go back to the High Court so that the State's application for enhancement may be dealt with according to law after giving the appellant an opportunity to show cause against his conviction.

Bhagwati, J. (Imam, J. subscribing to the judgment).—This appeal on certificate under Article 134 (1) (*c*) of the Constitution raises an important question as to the right of a convicted person to show cause against his con-

1. Pak.L.R. (1950) Lah. 803.

viction while showing cause why his sentence should not be enhanced under section 439 (6) of the Criminal Procedure Code.

The Appellant was charged before the Presidency Magistrate, 13th Court, Bombay, with having committed an offence punishable under section 66 (*b*) of the Bombay Act XXV of 1949 inasmuch as he was found in possession of one bottle of MacNaughtons Canadian Whisky (Foreign) containing 8 drams valued at Rs. 20. He was convicted by the learned Presidency Magistrate and was sentenced to imprisonment till the rising of the Court and a fine of Rs. 250 in default rigorous imprisonment for one month. He presented his petition of appeal to the High Court of Judicature at Bombay through his advocate. This petition of appeal was however summarily dismissed by the High Court after hearing the advocate on the 19th January, 1953. On the 18th May, 1953 a criminal revision application for enhancement of sentence was filed by the State and a rule was granted by the Vacation Judge on the 12th June, 1953. This rule came for hearing and final disposal before a Division Bench of the High Court on the 26th August, 1953. After hearing the Government Pleader in support of the rule the Court was not satisfied that there was a case for enhancement of sentence. The learned counsel for the Appellant then wanted to argue for an acquittal relying upon the provisions of section 439 (6) of the Criminal Procedure Code. Relying however upon the decisions of the Bombay High Court in *Emperor* v. *Jorabhai*,[1] and *Emperor* v. *Koya Partab*,[2] as also *Emperor* v. *Inderchand*,[3] the Court did not allow the learned counsel to argue that the order of conviction itself could not be sustained. The application for enhancement of sentence was thereupon dismissed and the rule was discharged. The Appellant applied for leave to appeal to this Court on the 15th October, 1953. The Division Bench of the High Court, hearing the application stated the point which arose for determination as under:— .

"Whether a summary dismissal of an appeal preferred by an accused person precludes him from taking advantage of the provisions of section 439(6) of the Criminal Procedure Code, when he is subsequently called upon to show cause why the sentence imposed upon him should not be enhanced."

It pointed out that the consistent view taken by the Bombay High Court in this matter had been accepted by the Allahabad and the Patna High Courts in *Emperor* v. *Naubat*,[4] and *Ramlakhan Chaudhury* v. *Emperor*,[5] but the view taken by the Lahore High Court in *Emperor* v. *Atta Mohammad*,[6] though not directly in point *prima facie* lent support to the contention urged by the learned counsel for the Appellant. A certificate was therefore granted to the Appellant that it was a fit case for appeal to this Court.

It will be convenient at this stage to briefly indicate the relevant sections of the Criminal Procedure Code which will fall to be considered. Section 417 provides for an appeal on behalf of the State Government to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court. Sections 419, 420, 421, 422 and 423 prescribe the procedure in cases of appeals. Section 419 deals with petitions of appeal presented by the appellant or his pleader and section 420 with petitions of appeal presented when the appellant is in jail. Section 421 provides for summary dismissal of these appeals if the Appellate Court considers that there is no sufficient ground for interfering, save that no appeal presented by the appellant or his pleader is to be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same, and the Court might also before dismissing an appeal summarily call for the record of the case though not bound to do so.

1. (1926) I.L.R. 50 Bom. 783.
2. (1930) 32 Bom.L.R. 1286.
3. (1934) 36 Bom.L.R. 954.
4. I.L.R. (1945) All. 527.
5. (1931) I.L.R. 10 Patna 872.
6. I.L.R. (1943) 25 Lah. 391 (F.B.).

If the Appellate Court does not dismiss the appeal summarily, notice of appeal is to be given to the appellant or his pleader or to such officer as the State Government may appoint in this behalf, under section 422 and the powers of the Appellate Court in dismissing the appeal are laid down in section 423, the only relevant provision for the present purpose being that in an appeal from a conviction the Appellate Court might with or without the reduction in sentence and with or without altering the finding alter the nature of the sentence but.........not so as to enhance the same. Section 430 incorporates the rule as to the finality of judgments and orders passed by an Appellate Court upon appeal except in cases provided for in section 417 which relates to appeals on behalf of the Government in cases of acquittal and Chapter XXXII which relates to reference and revision. Section 435 deals with the exercise of the revisional powers *inter alia* by the High Court to call for the records of the inferior criminal Courts for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of such inferior Courts. Section 438 provides for a reference by the lower Appellate Court to the High Court recommending that a sentence which has been imposed on a convicted person be reversed or altered. Section 439 with which we are immediately concerned is couched in the following terms:—

(1) In the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by Sections 423, 426, 427 and 428 or on a Court by Section 338, and may enhance the sentence; and when the Judges composing the Court of Revision are equally divided in opinion, the case shall be disposed of in manner provided by Section 429.

(2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(5) Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.

(6) Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under Sub-section (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction.

Section 440 lays down that no party has any right to be heard either personally or by pleader before any Court when exercising its powers of revision provided however that the Court may if it thinks fit, when exercising such powers hear any party either personally or by pleader and nothing in that section shall be deemed to affect section 439 (2) above.

A person convicted of an offence may file in the High Court a petition of appeal or an application for revision challenging his conviction and the sentence passed upon him. The petition of appeal may be presented by him from jail or may be presented by him to the High Court in person or through his pleader. An application for revision also may be similarly presented by him to the High Court. A petition of appeal presented by him from jail or presented by him in person or through his pleader as aforesaid may be summarily dismissed by the High Court after perusing the same if it considers that there is no sufficient ground for interfering, the latter after giving him or his pleader a reasonable opportunity of being heard in support of the same and in appropriate cases after calling for the record of the case. A notice of appeal may issue only if the High Court does not dismiss the appeal summarily and in that event only there would be a full hearing of the appeal in the presence of both the parties. In the case of an application for revision also the same may be dismissed summarily and without even hearing the party personally or by pleader. If however the Court

deems fit to issue notice to the opposite party there would be a full hearing in the presence of both the parties. These proceedings would normally be concerned with the question whether the conviction can be sustained and the sentence passed upon the convicted person be set aside or reduced. There would be no question here of the enhancement of the sentence. The question of enhancement of the sentence would only arise when the High Court in exercise of its revisional jurisdiction under section 439 (1) thought it necessary to issue a notice for enhancement of sentence to the convicted person. Even though the Court exercising its powers of revision would not be bound to hear any party personally or by pleader no order under section 439 (1) enhancing the sentence could be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence. In that event simultaneously with the opportunity given to him under Sub-section 2 of showing cause why his sentence should not be enhanced he would be entitled in showing cause also to show cause against his conviction by virtue of the provision of section 439 (6).

The exercise of this right of also showing cause against his conviction may arise in 4 different types of cases:—

(1) Where his petition of appeal has been summarily dismissed either without hearing him or after hearing him or his pleader as the case may be;

(2) When his appeal has been dismissed after a full hearing following upon the notice of appeal being issued to the opposite party;

(3) When his application for revision has been summarily dismissed either without hearing him or after hearing him or his pleader as the case may be; and

(4) Where his application for revision has been dismissed after a full hearing following upon a notice issued to the opposite party.

When the High Court issues a notice for enhancement of sentence it is exercising its revisional jurisdiction and the question that arises for consideration is whether in one or more of the cases above referred to the High Court has jurisdiction to issue the notice of enhancement of sentence and the convicted person is entitled while showing cause why his sentence should not be enhanced also to show cause against his conviction.

The view taken by the Bombay High Court in the cases noted above has been that in all the four cases mentioned above the accused has had an opportunity of showing cause against his conviction and that he is not entitled to a further or second opportunity of doing so while showing cause why his sentence should not be enhanced. It has not made any distinction between the exercise of appellate or revisional jurisdiction by the High Court nor between appeals or revision applications dismissed summarily or *in limine* and appeals or revision applications dismissed after a full hearing in the presence of both the parties. It has also extended the same principle to a reference made under section 438 and an order passed by the High Court thereupon—"No order on reference", without even issuing notice to the applicant at whose instance the Sessions Judge made the reference. (*Vide Emperor* v. *Nandlal Chunilal Bodiwala.*)[1] The Allahabad and the Patna High Courts have followed this view of the Bombay High Court in the decisions above referred to and the Lahore High Court in *Emperor* v. *Dhanalal*,[2] also followed the same. But this decision of the Lahore High Court was overruled by a Special Bench of that Court in *Emperor* v. *Atta Mohammad*[3]. The

1. (1945) 48 Bom. L.R. 41 (F.B.).
2. (1928) I.L.R. 10 Lah. 241.
3. (1943) I.L.R. 25 Lah. 391 (F.B.).

Special Bench held that the exercise of revisional jurisdiction by the High Court is entirely discretionary, that an application for revision is entertained as a matter of favour, that no party is entitled to be heard either himself or by pleader when the Court is exercising its revisional jurisdiction and that therefore a dismissal of an application for revision *in limine* tantamounts to a refusal by the Court to exercise its revisional jurisdiction and the convicted person under those circumstances is at all events entitled while showing cause why his sentence should not be enhanced also to show cause against his conviction. It went to the length of holding that section 439 (6) confers upon the convicted person an unfettered and unlimited right of showing cause against his conviction, which right cannot be taken away unless there is a judgment *in rem* which only would operate as a bar to the decision of the same matter when it arises in the exercise of what is in effect the exercise of the ordinary appellate jurisdiction. The Rajasthan High Court in *State* v. *Bhawani Shankar*,[1] has drawn a distinction between cases where the accused has not been heard at all and given no opportunity to show cause against his conviction his jail appeal having been dismissed under section 421 or his revision application having been dismissed without hearing him and cases where he has already been heard and given an opportunity to show cause against his conviction whether it be in appeal or in revision and whether his dismissal is summary or on the merits and held that in the former cases he is entitled to ask the Court to hear him and thus allow him to show cause against his conviction under section 439 (6) if a notice of enhancement is issued to him.

The principle as to the finality of criminal judgments has also been invoked while considering this question. This principle has been recognised by this Court in *Janardan Reddy and Others* v. *The State of Hyderabad and Others*,[2] at page 367 where Fazl Ali, J., observed:—

> It is true that there is no such thing as the principle of constructive *res judicata* in a criminal case, but there is such a principle as finality of judgments, which applies to criminal as well as civil cases and is implicit in every system, wherein provisions are to be found for correcting errors in appeal or in revision. Section 430, Criminal Procedure Code.........................has given express recognition to this principle of finality by providing that "Judgments and orders passed by an Appellate Court upon appeal shall be final, except in cases provided for in section 417 and Chapter XXXII".

Section 417 relates to appeals on behalf of Government in cases of acquittal by any Court other than a High Court and Chapter XXXII relates to reference and revision which also are powers exercised by the High Court over the judgments or orders of inferior Courts, thus excluding from the purview of this exception all judgments and orders passed by the High Court as an Appellate Court. Section 430 does not in terms give finality to the judgments of the High Court passed in exercise of its revisional jurisdiction, but the same principle would apply whether the High Court is exercising its appellate jurisdiction or its revisional jurisdiction, because in either case the High Court which is the highest Court of Appeal in the State would have pronounced its judgment, which judgment would replace the judgment of the lower Court and would be final. Even while exercising its revisional powers under section 439 the High Court exercises any of the powers conferred on a Court of Appeal by sections 423, 426, 427 428 and it is in effect an exercise of the appellate jurisdiction though exercised in the manner indicated therein. This principle of finality of criminal judgments therefore would equally apply when the High Court is exercising its revisional jurisdiction. Once such a judgment has been pronounced by the High Court either in the exercise of its appellate or its revisional juris-

1. I.L.R. (1952) 2 Raj. 716. 2. (1951) S.C.R. 344 : (1951) S.C.J. 320.

diction no review or revision can be entertained against that judgment and there is no provision in the Criminal Procedure Code which would enable even the High Court to review the same or to exercise revisional jurisdiction over the same. The judgment of the High Court would replace that of the lower Court which would no longer be subsisting but would be replaced by the High Court judgment and thus it is only the High Court judgment which would be final and would have to be executed in accordance with law by the Courts below. Section 425 requires that whenever a case is decided on appeal by the High Court it should certify its judgment or order to the Court by which the finding, sentence or order appealed against was recorded or passed and the Court to which the High Court certifies its judgment or order shall thereupon make such orders as are conformable to the judgment or order of the High Court and, if necessary, the record shall be amended in accordance therewith. Section 442 similarly provides that when a case is revised under Chapter XXXII by the High Court it shall in the same manner certify its decision or order to the Court by which the finding, sentence or order revised was recorded or passed and the Court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified and, if necessary, the record shall be amended in accordance therewith. These provisions are enacted because the High Court itself does not execute or carry into effect the sentences or orders passed against the convicted persons but the work of such execution has necessarily to be done in conformity with the sentences or orders passed by the High Court by the Courts which originally passed the same. Nevertheless the latter Courts execute or carry into effect the sentences or orders which are ultimately passed by the High Court and are invested with finality. In these cases there is no occasion at all for the exercise of the revisional powers by the High Court under section 439 (1) of the Criminal Procedure Code. That jurisdiction can only be exercised by the High Court when the record of the proceedings of Subordinate Courts has been called for by itself or the case has been reported to it for orders or has otherwise come to its knowledge and the High Court *suo motu* or on the application of the party interested thinks it fit to issue a notice for enhancement of sentence. This is a clear exercise of the revisional jurisdiction of the High Court and can be exercised by it only *qua* the judgments of the lower Courts and certainly not *qua* its own judgments which have replaced those of the lower Courts.

The Criminal Procedure Code unlike the Civil Procedure Code does not define "judgment" but there are observations to be found in a Full Bench decision of the Madras High Court in *Emperor* v. *Chinna Kaliappa Gounden and another*,[1] discussing the provisions of section 366 and section 367 of the Criminal Procedure Code and laying down that an order of dismissal under section 203 is not a judgment within the meaning of section 369. The principle of *autrefois acquit* also was held not to apply as there was no trial when the complaint was dismissed under section 203 with the result that the dismissal of a complaint under section 203 was held not to operate as a bar to the re-hearing of the complaint by the same Magistrate even when such order of dismissal had not been set aside by a competent authority. Section 366 lays down what the language and contents of a judgment are to be and section 367 provides that the judgment is to contain the decision and the reasons for the decision and unless and until the judgment pronounced by the Court complied with these requirements it would not amount to a judgment and such a

1. (1905) I.L.R. 29 Mad. 126 : 16 M.L.J. 79 (F.B.)

judgment when signed would not be liable to be altered or reviewed except to correct a clerical error by virtue of the provisions of section 369 save as therein provided. These observations of the Madras High Court were quoted with approval by Sulaiman, J. in *Dr. Hori Ram Singh* v. *Emperor*.[1] He observed that the Criminal Procedure did not define a judgment but various sections of the Code suggested what it meant. He then discussed those sections and concluded that 'judgment' in the Code meant a judgment of conviction or acquittal. Reference was then made to the observations of Sir Arnold White, C. J., in Emperor v. *Chinna Kaliappa Gounden and another*,[2] which were followed by another Division Bench of the Madras High Court in *Emperor* v. *Maheshwara Kondaya*,[3] and it was held that an order of discharge was not a judgment as "a judgment is intended to indicate the final order in a trial terminating in either the conviction or acquittal of the accused". A Full Bench of the Bombay High Court in *Emperor* v. *Nanalal Chunilal Bodiwala*,[4] pronounced that a judgment is the expression of the opinion of the Court arrived at after due consideration of the evidence and all the arguments. It was pointed out that sections 366 and 367 applied to the judgments of the trial Court and section 424 dealing with the judgments of the Appellate Courts provided that the rules relating to the judgments of a Trial Court shall apply so far as may be practicable to the judgment of any Appellate Court other than a High Court. It followed therefore that there was no definite rule as to what the judgment of a High Court acting in its appellate as well as its revisional jurisdiction should contain. It was quite natural because the judgment of the High Court in its criminal jurisdiction was ordinarily final and did not therefore require the statement of any reasons whether the High Court was exercising its appellate or revisional jurisdiction. The judgment howsoever pronounced was however the expression of the opinion of the Court arrived at after due consideration of the evidence and all the arguments and would therefore either be a judgment of conviction or acquittal and where it would not be possible to predicate of the pronouncement that it was such an expression of opinion the pronouncement could certainly not be taken as the judgment of the High Court.

A judgment pronounced by the High Court in the exercise of its appellate or revisional jurisdiction after issue of a notice and a full hearing in the presence of both the parties would certainly be arrived at after due consideration of the evidence and all the arguments and would therefore be a judgment and such judgment when pronounced would replace the judgment of the lower Court, thus constituting the judgment of the High Court the only final judgment to be executed in accordance with law by the Court below. When however a petition of appeal presented by a convicted person from jail is summarily dismissed under section 421 or a revision application made by him is dismissed summarily or *in limine* without hearing him or his pleader what the High Court does is to refuse to entertain the petition of appeal or the criminal revision and the order passed by the High Court—"dismissed or rejected" cannot be said to be the expression of the opinion of the Court arrived at after due consideration of the evidence and all the arguments. It is a refusal to admit the appeal or the criminal revision so that notice be issued to the opposite party and the matter be decided after a full hearing in the presence of both the parties. It would be only after the appeal or the criminal revision was admitted that such a notice would issue and the mere refusal by the High Court to entertain the appeal or the criminal revision would certainly

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1. A.I.R. 1939 Federal Court 43 : 1939 F.L.J. 153 : (1939) 2 M.L.J. (Supp.) 23.
2. (1905) I.L.R. 29 Mad. 126 : 16 M.L.J. 79 (F.B.).
3. (1908) I.L.R. 31 Mad. 543.
4. (1945) 48 Bom.L.R. 41 (F.B.).

not amount to a judgment. The same would be the position when a reference was made by the lower Court to the High Court under section 438 and the High Court on perusing the reference made an order—"no order on the reference"—as the High Court on a consideration of the terms of the reference must have come to the conclusion that no *prima facie* case has been made out to warrant an interference on its part. If the High Court thought that it was a *prima facie* case for its interference it would certainly entertain the reference and issue a notice to the parties concerned to show cause why the judgment and order passed by the lower Court should not be revised.

When a petition of appeal is presented to the High Court by the convicted person or his pleader section 421 provides that no such appeal should be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same and the High Court might before dismissing an appeal under that section, call for the record of the case but would not be bound to do so. Even in such a case the hearing accorded to the appellant or his pleader would be with a view to determine whether there was a *prima facie* case made out to warrant its interference in appeal. The appellant or his pleader would be heard in support of that position and if he satisfied the High Court that there was a *prima facie* case for its interference the High Court would admit the appeal and order a notice to issue to the opposite party in which event the appeal would be decided after a full hearing in the presence of both the parties. The calling for the records of the case also though not compulsory but discretionary with the Court would be for this very purpose, *viz.*, to determine whether a *prima facie* case for its interference was made out. The whole purpose of the hearing accorded to the appellant or his pleader even after calling for the records of the case would be to determine whether a *prima facie* case for its interference was made out and it would not be within the province of the Court at that stage to fully consider the evidence on the record and hear arguments from the appellant or his pleader with a view to determine whether the conviction could be sustained or the sentence passed upon the accused could be reduced. The setting aside of the conviction and the reduction, if any, in the sentence could only be determined by the Court after notice was issued to the opposite party and a full hearing took place in the presence of both the parties. Even in the case of a summary dismissal of a petition of appeal under these circumstances the position would certainly not be any different from that which obtains in the case of a summary dismissal of the petition of appeal presented by the convicted person from jail or the summary dismissal of an application for criminal revision made by him or on his behalf to the High Court. In all these cases there will be no judgment of the High Court replacing the judgment of the lower Court and the action of the High Court would only amount to a refusal by the High Court to admit the petition of appeal or the criminal revision and issue notice to the opposite party with a view to the final determination of the questions arising in the appeal or the revision. The order dismissing the appeal or criminal revision summarily or *in limine* would no doubt be a final order of the High Court not subject to review or revision even by the High Court itself but would not tantamount to a judgment replacing that of the lower Court. The convicted person would be bound by that order and would not be able to present another petition of appeal or application for criminal revision challenging the conviction or the sentence passed upon him by the lower Court. But such order would not have the effect of replacing the judgment or order of the lower Court which would in that event be subject to the exercise of revisional jurisdiction by the High Court under section 439 of the Criminal Procedure Code at the instance of the State or an interested party. In the cases (1) and (3) noted

above therefore there being no judgment of the High Court replacing the judgment of the lower Court section 439 (1) would operate and the High Court in exercise of its revisional jurisdiction either *suo motu* or on the application of the interested party would be in a position to issue the notice of enhancement of sentence which would require to be served on the accused under section 439 (2) so that he would have an opportunity of being heard either personally or by pleader in his own defence. In that event the convicted person in showing cause why his sentence should not be enhanced would also be entitled to show cause against his conviction.

It follows therefore that in the case of a summary dismissal or a dismissal *in limine* of petitions of appeal or applications for criminal revision even if the convicted person or his pleader has been heard by the High Court with a view to determine if there is a prima facie case for its interference, the convicted person to whom an opportunity has been given under section 439 (2) of showing cause why his sentence should not be enhanced would in showing cause be entitled also to show cause against his conviction. The same would also be the position when a reference made by the lower Court to the High Court under section 438 of the Criminal Procedure Code is rejected by the High Court without issuing notice to the parties concerned by merely ordering—"no order on the reference". In cases where the petition of appeal or the application for criminal revision is admitted by the High Court and a notice is issued to the opposite party and the High Court maintains the conviction with or without reducing the sentence passed upon the accused the judgment of the High Court in the exercise of its appellate or revisional jurisdiction would replace the judgment of the lower Court and there would be no occasion at all for the exercise by the High Court of its revisional powers under section 439 (1) which can only be exercised *qua* the judgments of the lower Courts and certainly not *qua* its own judgments. The cases (2) and (4) noted above would therefore be outside the purview of section 439 (1). If that is so there would be no question of giving the accused an opportunity of being heard either personally or by pleader in his defence under section 439 (2) and the provisions of section 439 (6) would certainly not come into operation at all. If no notice of enhancement of sentence could issue under these circumstanres no question at all could arise of the convicted person showing cause why his sentence should not be enhanced and being entitled in showing cause also to show cause against his conviction.

It follows by way of a necessary corollary that no notice for enhancement of sentence can be issud by the High Court when a judgment is pronounced by it after a full hearing in the presence of both the parties either in exercise of its appellate or its revisional jurisdiction. Such notice for enhancement of sentence can be issued by it either suo motu or at the instance of an interested party when the judgment of the lower Court subsists and is not replaced by its own judgment in the exercise of its appellate or its revisional jurisdiction. When the judgment of the lower Court has been under its scrutiny on notice being issued to the opposite party and on a full hearing accorded to both the parties notice for enhancement of sentence can only be issued by it before it pronounces its judgment replacing that of the lower Court. When such hearing is in progress it is incumbent upon the High Court or the opposite party to make up its mind before such judgment is pronounced whether a notice for enhancement of sentence should issue to the accused. There would be ample time for the opposite party to make up its mind whether it should apply for a notice of enhancement of the sentence. The High Court also on a perusal of the record and after hearing

the arguments addressed to it by both the parties would be in a position to make up its mind whether it should issue such notice to the accused. But if neither the opposite party nor the High Court does so before the hearing is concluded and the judgment is pronounced it will certainly not be open to either of them to issue such notice for enhancement of sentence to the accused, because then the judgment of the High Court in the exercise of its appellate or revisional jurisdiction would replace that of the lower Court and section 439 (1) would have no operation at all. Even in the case of a reference by the lower Court under section 438 of the Criminal Procedure Code the High Court if it did not summarily reject such a reference would issue notice to the parties concerned and then there would be occasion for it either *suo motu* or on the application of an interested party to issue a notice of enhancement of sentence before the hearing was concluded and a judgment was pronounced by it. The procedure obtaining in the several High Courts to the effect that notice for enhancement of sentence can issue even after the appeal or the application for criminal revision is disposed of by the High Court and judgment pronounced thereupon is not correct and is contrary to the true position laid down above.

It was contended that the *non-obstante* clause in section 439 (6), viz., "notwithstanding anything contained in this section" was meant to confer upon the convicted person a right to show cause against his conviction in those cases where a notice to show cause why his sentence should not be enhanced was issued against him, whatever be the circumstances under which it might have been issued. Once you had a notice for enhancement of sentence issued against the convicted person this right of showing cause against his conviction also accrued to him and that right could be exercised by him even though he had on an earlier occasion unsuccessfully agitated the maintainability of his conviction either on appeal or in revision. This *non-obstante* clause could not, in our opinion, override the requirements of section 439 (1) which provides for the exercise of revisional powers by the High Court only *qua* the judgments of the lower Courts. Section 439 (6) would not come into operation unless a notice for enhancement was issued under section 439 (2) and a notice for enhancement of sentence under section 439 (2) could not be issued unless and until the High Court thought it fit to exercise its revisional powers under section 439 (1) *qua* the judgments of the lower Courts. The High Court has no jurisdiction to exercise any revisional powers *qua* its own judgments or orders, the same being invested with finality and otherwise being outside the purview of the exercise of its revisional jurisdiction, and the only purpose of the *non-obstante* clause in section 439 (6) can be to allow the convicted person also to show cause against his conviction when he is showing cause why his sentence should not be enhanced in spite of the prohibition contained section 439 (5). Where an appeal lies under the Code and no appeal is brought no proceedings by way of revision can be entertained at the instance of the party who could have appealed. If the convicted person could have filed an appeal but had failed to do so he could certainly not approach the High Court in revision and ask the High Court to set aside his conviction. If he could not file any application in revision he could not show cause against his conviction under section 439 (1) of the Criminal Procdure Code and it was in order to remove this disability that the *non-obstante* clause in section 439 (6) was enacted so that when the High Court was exercising its revisional jurisdiction the convicted person could show cause against his conviction in spite of the fact that otherwise he could not have been able to do so, he not having appealed when an appeal lay and therefore not being entitled to file an appli-

cation in criminal revision and challenge the validity or maintainability of his conviction. Section 439 (6) therefore confers on the convicted person a right which he can exercise in the event of a notice for enhancement of sentence being issued against him in the exercise of the revisional jurisdiction by the High Court in spite of the fact that he was not entitled to question the validity or maintainability of his conviction in a substantive application for criminal revision filed by him for the purpose and this right is available to him only if the High Court exercising its revisional jurisdiction under section 439 (1) thinks it fit to issue a notice of enhancement of sentence against him under section 439 (2) and in that event he has the right also to show cause against his conviction when showing cause why his sentence should not be enhanced.

We shall now review the decisions of the various High Courts to which our attention has been drawn by the learned counsel appearing before us. Turning first to the decisions of the Bombay High Court we were referred to *Emperor* v. *Chinto Bhairava*,[1] a decision given in the year 1908 which recognised the invariable practice of that Court for over 25 years according to which the accused in showing cause why the sentence should not be enhanced was not allowed to discuss the evidence and satisfy the Court that he had been wrongly convicted. The practice of the Court in such cases was to accept the conviction as conclusive and to consider the question of enhancement of sentence on that basis. It was open to the accused to apply for revision of the conviction, but having failed to avail himself of that, he could not be permitted to assail the conviction in a proceeding where the sole question was whether the sentence passed by the lower Court was adequate or not. It may be noted that this decision was in the year 1908 long before the amendment of Section 439 of the Criminal Procedure Code by Act XVIII of 1923 by adding sub-section (6) thereto.

The next decision to which we were referred was *Emperor* v. *Mangal Naran*.[2] In that case simultaneously with the admission of an appeal filed by the accused the Court issued a notice for enhancement of sentence. When the appeal and the notice came for hearing together before the Division Bench the Court observed that such a practice was not desirable. It was likely to produce an impression on the mind of an illiterate accused in jail that it was proposed to enhance the sentence because he had appealed. MacLeod, C.J. there expressed an opinion that if after an appeal had been heard on its merits and dismissed a notice to enhance the sentence was issued, the accused had still the right to show cause against his conviction, though any attempt to set aside the conviction would not have much chance of success. He however expressed his preference in favour of the old practice, viz. first to deal with the appeal and then to consider whether a notice to enhance should issue. No question had arisen for consideration of the Court in that case as to the true construction of the provision of Section 439 (6) of the Criminal Procedure Code and the only question considered by the Court there was what should be the proper procedure to be adopted when issuing a notice for enhancement of sentence, whether it should be issued simultaneously with the admission of the appeal or after the appeal was finally heard and disposed of.

This opinion expressed by MacLeod, C.J. was therefore treated as obiter in *Emperor* v. *Jorabhai Kisanbhai*.[3] The question that arose for consideration of the Court in that case was whether after an appeal of an accused person against his conviction and sentence had been dismissed by a Division Bench

1. (1908) I.L.R. 32 Bom. 162.
2. (1924) 27 Bom.L.R. 355.
3. (1926) I.L.R. 50 Bom. 783.

of the High Court and a notice to enhance the sentence was issued on an application on behalf of the Government the application for enhancement of sentence could be heard on its merits by another Division Bench of the High Court treating the conviction as correct or the accused was under such circumstances not entitled under Section 439 (6) to be re-heard on the merits of his conviction. The appeal filed by the accused against his conviction and sentence had been dismissed on the 7th April, 1926. After judgment was delivered by the Court, the Government Pleader applied orally for issue of a notice for enhancement and that application was granted. The application was heard on the 17th June 1926 and it was urged on behalf of the accused that the only proper procedure was to issue a notice for enhancement of sentence before the appeal had been actually disposed of and that once the appeal was disposed of by the Court there was no legal power to enhance the sentence under Section 439 of the Criminal Procedure Code. That contention was negatived the Court observing that so far as the point of procedure was concerned there was no hard and fast rule as to the appropriate time for the issue of notice of enhancement of sentence by the High Court and resorting to the principle of the finality of judgments as regards the accused being concluded by the judgment of the High Court dismissing his appeal and confirming the sentence passed upon him. The judgment there was interpreted as confirming the conviction and rejecting the appeal as to the sentence in the sense that it saw no reason to reduce it and that was not treated as a decision that the sentence should not be enhanced if a proper procedure was taken such as the Code allowed for the purpose and therefore so far as the judgment went there was nothing which in any way tied the hands of the Court. Sections 369 and 430 of the Criminal Procedure Code were referred to and the Court held that the observations of MacLeod C.J. in *Emperor* v. *Mangal Naran*,[1] above referred to were *obiter dicta* not binding upon them and the application must be heard on the merits treating the conviction as correct in view of the dismissal of the appeal.

It is no doubt true as observed by Madgavkar, J. in regard to the practice as to the proper time for issuing of the notice of enhancement that the question of adequacy of punishment is, in the first instance, a matter for the Government and for the District Magistrate. From the time when the sentence is passed, and at all events up to the time when an appeal is admitted and notice is received, it is open to Government to consider the sufficiency of a sentence and before hearing of the appeal, to apply to the High Court for enhancement of the sentence if they are so advised. In that event the appeal as well as the notice of enhancement would be heard together and the Court hearing the appeal would apply its mind not only to the question whether the conviction should be confirmed but also to the question whether the sentence should be reduced or enhanced as the case may be. It is only in rare instances that the High Court considers for itself, the question of enhancement of sentence and only if no action has been taken by the Government and if the High Court thinks that the interests of justice imperatively demand it. In such a case it would be a matter for consideration by the High Court whether it should issue notice at the very time of the admission or whether it should do so while disposing of the appeal on the merits as to the conviction. The observations of the learned Judge however in so far as they seem to suggest that the appeal should be disposed of first and the question of enhancement of sentence should be considered by the same Bench immediately afterwards or that the notice for enhancement could be issued by the Court after the disposal of the appeal on the merits as to con-

1. (1924) 27 Bom.L.R. 355.

viction do not take into account the fact that after the judgment is pronounced and the conviction is confirmed involving as a necessary corollary thereof the confirming of the sentence passed upon the accused also if the same is not reduced, the judgment of the High Court replaces that of the lower Court and the exercise of any revisional powers by the High Court by way of enhancement of the sentence is necessarily eschewed. These revisional powers could only be exercised by the High Court *qua* the judgment of the lower Court and once that judgment is replaced by the judgment of the High Court, the High Court has no further powers to review or revise its own judgment and enhance the sentence which is thus passed by it upon the accused. The principle as to the finality of judgments applied by the Court by virtue of the provisions of section 369 and Section 430 of the Criminal Procedure Code should not have been confined merely to the question of confirming the conviction but also should have been extended to the confirming of the sentence in so far as the High Court did not see any reason to reduce the sentence already passed by the lower Court upon the accused. When the High Court hears the appeal on its merits it does not apply its mind only to the question whether the conviction should be confirmed but also applies its mind to the adequacy of the sentence passed upon the accused by the lower Court. In thus applying its mind to the question of sentence it also considers whether the sentence passed upon the accused by the lower Court is adequate in the sense that it is either such as should be reduced or is such as should be enhanced. The questions of the reduction of the sentence or enhancement of the sentence are not to be viewed as if they fall into water-tight compartments and the mind of the Court hearing the appeal on merits is directed to the consideration of the matter in all its aspects including the confirming of the conviction and the reduction or enhancement of the sentence as the case may be. The principle of finality of judgments should therefore be extended not only to the question of the confirming of the conviction but also to the question as to the adequacy of the sentence, whether the sentence which is passed upon the accused by the lower Court should be reduced, confirmed or enhanced. Once therefore the judgment of the High Court replaces that of the lower Court there is no question which can ever arise of the exercise by the High Court of its revisional powers under Section 469 (1) of the Criminal Procedure Code and the proper procedure therefore if the High Court thought it fit either *suo motu* or on the application of the interested party to issue the notice of enhancement of sentence, is to issue the said notice before the hearing of the appeal is concluded and the judgment of the High Court in appeal is pronounced. We are therefore of the opinion that the decision reached by the High Court of Bombay in *Emperor* v. *Jorabhai*[1] was not correct in so far as it held that the notice of enhancement could be issued by the High Court at the instance of the Government after the dismissal of the appeal on merits. The notice for enhancement issued in that case was not competent and should not have been issued at all by the High Court.

The decision in *Emperor* v. *Jorabhai*[1] was followed in *Emperor* v. *Koya Partab*[2] which extended the same principle to an appeal which had been presented from jail and was summarily dismissed under Section 421 of the Criminal Procedure Code. While dismissing the same the Court issued a notice for enhancement. When the notice came for hearing the accused contended that he was entitled to be heard on the merits as to whether he should have been convicted or not relying upon the provisions of Section 439 (6). Beaumont, C.J. relied upon the provisions of Section 430 and observed that the accused was not at liberty to be heard on the merits. The judgment of

1. (1926) I.L.R. 50 Bom. 783. 2. (1930) 32 Bom.L.R. 1286.

the Court of Appeal dismissing the appeal on the 9th June, 1930 was a final order which the Court was not at liberty to differ from and the *non-obstante* clause in Section 439 (6) did not entitle the accused to go behind Section 430 and to show cause against his conviction after his appeal had been dismissed. The learned Chief Justice followed the decision in *Emperor* v. *Jorabhai*[1] and observed that the only distinction between that case and the one before him was that that case had been heard on the merits and not summarily dismissed. But in his view that distinction was not one of principle. We are of the opinion that the order which had been pronounced by the Court of Appeal on the 9th June, 1930, was not a judgment of the High Court which replaced that of the lower Court and even though it might come within the description of an order within the meaning of Section 430 it was not a judgment within the meaning of the term set out above and not being a judgment was no bar to the accused showing cause also against his conviction when showing cause against the notice for enhancement. The matter was one falling within the category of case No. 1 noted above and it was open to the accused even though his petition of appeal from jail was summarily dismissed under Section 421 to urge while showing cause against the notice of enhancement of sentence also to show cause against his conviction. This decision was therefore in our opinion incorrect and the accused ought to have been heard on the merits as to whether he should have yeen convicted or not.

Emperor v. *Ramchandra Shankarshet Uravane*,[2] was a case where the High Court admitted the appeal and at the same time issued a notice to the accused for enhancement of sentence. The observations of MacLeod, J. in *Emperor* v. *Mangal Naran*,[3] were followed in spite of the fact that they had been held obiter by the Division Bench of the Court in *Emperor* v. *Jorabhai*.[1] *Emperor* v. *Jorabhai*[1] was also referred to and it was held that it was neither nesessary nor desirable for the High Court to issue a notice for enhancement of sentence at the time of admission of the appeal. It was however observed that it was open to consider the question of enhancement of sentence after the appeal had been heard. If those observations were meant to convey that the question of enhancement of sentence could be considered after the appeal had been disposed of and judgment was pronounced by the High Court we do not agree with the same. But if they were meant to convey that the High Court could hear the accused on the question of enhancement of the sentence at the same time when his appeal was heard, before pronouncement of the judgment on the question of the conviction and the sentence passed upon him, they were perfectly in order.

The decision in *Emperor* v. *Inderchand*[4] extended the principle enunciated in *Emperor* v. *Jorabhai*[1] further by applying it to a case where an application for revision by the accused against his conviction and sentence had been dismissed by the High Court. In that case the accused had filed an application for revision which was summarily dismissed by the Vacation Judge on the 30th April, 1954. After such summary dismissal of the application the Government filed the criminal revision application for enhancement of sentence. The Division Bench held that the criminal revision application of the accused having been fully disposed of by the learned Vacation Judge there was a valid order of dismissal, that Section 430 debarred the accused from having that order of dismissal reviewed by the High Court that the right conferred by Section 439 (6) could not give an accused person a right to be heard against his conviction if such a right was in conflict with

1. (1926) I.L.R. 50 Bom. 783.
2. (1932) 35 Bom.L.R. 174.
3. (1924) 27 Bom. L.R. 355.
4. (1934) 36 Bom. L.R. 954.

the other provisions of the Code, that under Section 369 the Court had no power to alter the decision of the learned Vacation Judge dismissing the revision petition filed by the accused and that if the accused had already unsuccessfully exercised his right of appeal or revision to the High Court he was not entitled in a subsequent application by the Government for enhancement of sentence to ask the High Court to go once more into the merits of the case and to set aside the conviction which the same Court had previously confirmed either in appeal or on a revision application. Divatia, J. was conscious of the somewhat anomalous position so far as the accused was concerned and referred to the observations of the Court in *Emperor* v. *Babu Pandurang Mhaske*[1] where it was stated and rightly that where the High Court itself wanted to enhance the sentence, in order that the accused might have the right to challenge his conviction before the same bench which was hearing either the appeal or the application for enhancement, it was proper that the application for enhancement should be heard before the appeal was finally decided, so that the accused might be heard at the very time when the question of enhancement was before the Court. While approving of these observations the learned Judge however, observed that it was possible only in a case where the High Court itself wanted to enhance the sentence and gave notice to the accused and not so in a case where Government approached the High Court by way of a revisional application as it was entitled to do under Section 439 (1). Government might approach the High Court in revision under Section 439 (1) at any time within six months after the decision of the lower Court and in the meanwhile the accused might have come to the High Court and his application might have been rejected. That might result in this that the conviction might be confirmed by one Bench or a single Judge as might happen in a particular case and the application for enhancement might be heard by another Bench. But, so far as the provisions of the section were concerned, whatever might be the anomaly in this procedure, the learned Judge did not think that the inconvenience or hardship to the accused should lead the Court to construe Section 439 of the Criminal Procedure Code in a manner which, according to the view of the learned Judge, was not intended by the Legislature. These observations however did not take count of the fact that if a petition of appeal or a criminal revision application filed by the accused was dismissed summarily or in limine there was no question of a judgment of the High Court replacing that of the lower Court and the order of the High Court merely amounted to a refusal by it to interfere either in the exercise of its appellate or revisional jurisdiction which order though final and not being susceptible of review or revision by the High Court itself, did not amount to a judgment of the High Court barring the application of Section 439 (1) of the Criminal Procedure Code. In that event the judgment of the lower Court not being replaced by a judgment of the High Court it could be the subject-matter of criminal revision at the instance of the Government in the matter of the enhancement of the sentence and all the provisions of Section 439 would then come into operation. The High Court would be bound then under Section 439 (2) to give an opportunity to the accused to be heard in his defence before the sentence passed upon him by the lower Court was enhanced and the accused would under Section 439 (6) be entitled in showing cause against the notice of enhancement also to show cause against his conviction. This decision of the High Court therefore was incorrect and the accused ought to have been allowed in spite of the summary dismissal of his application in revision to show cause against his conviction while showing cause against the notice for enhancement.

1. (1934) 36 Bom. L.R. 382.

One more decision of the Bombay High Court may be referred to and that is *Emperor* v. *Nandlal Chunilal Bodiwala.*[1] That was a case where the Sessions Judge of Ahmedabad had at the instance of the petitioner made a reference to the High Court recommending that the Additional Magistrate had no jurisdiction, power or authority to pass the order complained against and that the High Court should quash the same. On the reference coming before the High Court the following order was passed without issuing notice:—"no order on this reference". The petitioner thereupon filed a criminal revision application to the High Court praying that the order of the Additional District Magistrate be quashed. This revision application came for hearing before a Division Bench and the Court requested the Chief Justice to constitute a Full Bench to consider the following point:

> " When on a reference made by the Sessions Judge under section 438 of the Criminal Procedure Code, a Division Bench of this Court passes an order without issuing notice, *viz.*, ' No order on this reference,' whether the applicant at whose instance the Sessions Judge made the reference is entitled to make an application in revision to this Court in the same matter, in view of the provisions of section 369 of the Criminal Procedure Code."

The application was heard by a Full Bench and it was contended on behalf of the petitioner that when the High Court without issuing notice to the applicant disposed of the reference made by the Sessions Judge by stating "no order on the reference" there was no judgment given on the merits. The order of the Court only meant that the Court would not allow the matter to be brought before it on the recommendation of the Sessions Judge and merely disposed of it on that view. If a mere order of disposal of a reference or revision application amounted to a judgment the party in whose favour a reference was made by the Sessions Judge would be deprived of the right he had of approaching the High Court in revision against the order, if the Court disposed of the matter in the manner it had done in that case. This argument was repelled by the Full Bench. It held that Section 369 of the Criminal Procedure Code debarred the petitioner from making the criminal revision application, that the order of the High Court passed upon the reference amounted to a judgment within the meaning of that term in Section 369 of the Criminal Procedure Code and after it was signed it could not be altered or reviewed in a subsequent application for revision and that even though the Division Bench of the High Court passed the order "no order on this reference" without issuing notice to the applicant, the applicant in whose favour the Sessions Judge made a reference was not entitled to make an application in revision to the High Court in the same matter. Even though this conclusion was reached by the Full Bench they observed that they were not unaware that the applicant had a grievance that his position had been worsened and not improved by the Sessions Judge being in his favour, because if the recommendation of the Sessions Judge was turned down without hearing the petitioner, as had happened in that case he was worse off, while if the Sessions Judge would have been against him he could have still applied to the High Court in revision and got an opportunity to put his case before the High Court. This was recognised no doubt as an anomaly but it was caused by the provision of Rule 26 of the Appellate Side Rules of the Bombay High Court which compelled a party to apply to a lower revisional Court before applying in revision to the High Court. This disability which the petitoner suffered from was emphasised in that if the Sessions Judge had dismissed his application he could then have applied to and argued his case before the High

1. (1945) 48 Bom. L.R. 41 (F.B.).

Court, but because the Sessions Judge was in his favour and had therefore got to make a reference to the High Court recommending it to set aside the order and because the High Court was not satisfied with the reasons for the recommendation, and disposed of it without issuing a rule, the petitioner was debarred from urging his arguments before the High Court. It might be that the reasons given by the Sessions Judge for the recommendation might be weak or might be insufficient, whereas the petitioner, if he appeared might be able to urge cogent and sufficient reasons for setting aside the original order. In spite of pointing out this disability the only recommendation which was made by the Full Bench was that the Rule 26 of the Appellate Side Rules should be properly amended so as to issue notice to all the parties concerned when a reference was made by a Sessions Judge recommending the setting aside of an order of the Trial Court. We are of the opinion that the Full Bench should not have stopped short at pointing out this disability which the applicant suffered from but should have gone further and held that the order passed by the High Court on the reference, though final under Section 430 of the Criminal Procedure Code was not a judgment within the meaning of that term and therefore did not debar the applicant from making the criminal revision application which he did under Section 439 (1) of the Criminal Procedure Code. Such an order did not amount to a judgment within the definition thereof given by the Full Bench itself which was: "a judgment is the expression of the opinion of the Court arrived at after due consideration of the evidence and of the arguments" as pointed out earlier in the course of this judgment. We are of the opinion that this decision of the Bombay High Court was also incorrect.

Emperor v. *Jorabhai*,[1] was followed by the Lahore High Court in *Emperor* v. *Dhanalal*.[2] In that case a revision petition filed on behalf of the convicted person was dismissed after hearing counsel. Subsequently a report of the Sessions Judge was received and the learned Judge who had dismissed the revision petition issued a notice for enhancement of sentence and the Court held that Section 439 (6) was meant to give an accused person to whom a notice for enhancement was issued and who had not appealed or if no appeal lay had not applied for revision of his conviction, an opportunity to question the correctness of his conviction if it was proposed to enhance his sentence. But if a petition for revision against his conviction by a convict had been rejected by a Judge of the High Court and a notice had subsequently been issued to him to show cause why his sentence should not be enhanced the convict was barred from showing cause against his conviction and the fact that the previous order dismissing the revision was passed without issuing notice to the opposite party made no difference to the position. The Court also invoked the principle of the finality of judgments and further held that the words "unless he had already done so" though not occurring at the end of the sub-section were to be presumed to be implied from the ordinary presumption as to the finality of orders in criminal revision proceedings. In arriving at this conclusion Addison, J. observed:—

> "In the present case there has been a judgment of this Court on the very full revision application brought by the convict. By that judgment the petition was dismissed and the conviction confirmed. Under section 369, Criminal Procedure Code that judgment cannot be reviewed. It is a final judgment of this Court, and in my opinion the provisions of sub-section (6), section 439, do not give the convict another opportunity in these circumstances to be heard as regards his conviction."

There was no justification whatsoever for reading the words "unless he had already done so" in the section and the reasoning adopted by the learned Judge in our opinion wrongly invested the order passed by the High Court

1. (1926) I.L.R. 50 Bom. 783.
2. (1928) I.L.R. 10 Lah. 241.

in the exercise of its revisional jurisdiction dismissing the application without issuing a notice to the opposite party with the character of a judgment which could only be enjoyed by it if it had been pronounced after a full hearing in the presence of both the parties after notice issued to the opposite party. Then the pronouncement of the High Court would have been a judgment replacing the judgment of the lower Court and not subject to the exercise of any revisional jurisdiction under Section 439 (1) of the Criminal Procedure Code. Where the petition for revision against his conviction presented by the convict had been rejected by the High Court *in limine* the order passed by the High Court did not tantamount to a judgment which would debar the convict from showing cause against the conviction when showing cause against a subsequent notice for enhancement of sentence issued by the High Court.

The learned Judge further observed:

"There appears to be no distinction between dismissing a revision petition *in limine* or after notice. The judgment is in either case an effective and final judgment of the Court. In this respect there is no difference between a revision petition and a memorandum of appeal......In these circumstances I can see no force in the argument that an order dismissing a revision petition without issuing notice is different from an order after the issue of notice, or that there is any distinction between a judgment of this Court passed on the revision side and one on the appellate side."

While agreeing with the observations of the learned Judge that for the purposes of Section 439 (1) there was no distinction between a judgment of the High Court passed on the revision side and one on the appellate side we are of the opinion that there is a real distinction between orders dismissing a revision petition or a petition of appeal *in limine* without issuing notice to the opposite party and judgments pronounced by the High Court in the exercise of its appellate or revisional jurisdiction after a full hearing in the presence of both the parties after the issue of notice. The latter are judgments in the true sense of the term which debar the exercise of revisional jurisdiction by the High Court under Section 439 (1) of the Criminal Procedure Code.

This decision of the Lahore High Court was however overruled by a Special Bench of that Court in *Emperor* v. *Atta Mohammad*.[1] A criminal revision application had been dismissed *in limine* and thereafter a notice for enhancement of sentence was issued by the High Court. The decision of that Court in *Emperor* v. *Dhanalal*,[2] following *Emperor* v. *Jorabhai*,[3] was cited as debarring the accused from showing cause against his conviction and Blacker, J. before whom the matter was argued in the first instance recommended a reference to a larger Bench and the reference came up for hearing and final disposal before a Special Bench of the Court. It was held that the accused was entitled to show cause against his conviction notwithstanding the fact that his petition for revision of the order by which he was convicted had already been dismissed *in limine* under Section 435 of the Criminal Procedure Code. The question whether an order under Section 435 was a judgment was discussed by Blacker, J. while pronouncing the judgment of the Special Bench. He referred to the case of *Dr. Hori Ram Singh* v. *Emperor*,[4] above referred to and quoted with approval the observations of Sulaiman, J. that every order in a criminal matter was not a judgment and that 'judgment' in the Criminal Procedure Code meant a judgment of conviction or acquittal. Applying this definition the learned Judge observed:—

1. (1943) I.L.R. 25 Lah. 391 (F.B.)
2. (1928) I.L.R. 10 Lah. 241.
3. (1926) I.L.R. 50 Bom. 783.
4. (1939) 2 M.L.J. (supp.) 23 : A.I.R. 1939 F.C. 43 : 1939 F.L.J. 153.

"It will be seen that an order under section 435 can with difficulty be called a judgment. All that a Judge does at this preliminary stage is either to send for the records of the lower Court with a view to examining them under section 439 (1) or to refuse to do so. It is difficult to see how the latter can possibly be called a judgment of conviction. When such an order consists of the one word "Dismissed" can it necessarily be taken as a judicial pronouncement that in the opinion of the Judge the respondent was rightly convicted upon the evidence? It seems to me that all that it means is that the Judge sees no adequate ground disclosed in the petition or on the face of the judgment for proceeding further."

This reasoning in our opinion was quite sound. But the learned Judge proceeded further to make a distinction between the summary dismissal of a petition of appeal under Section 421 and the summary dismissal of a criminal revision application under Section 435 stating that the reasons for which the High Court would summarily dismiss an appeal were very different from those for which it would refuse to interfere in revision, and in the case of appeal it would only do so when the material before it was sufficient to satisfy it beyond any doubt of the accused's guilt, whereas, on revision the High Court would not interfere merely because it did not agree on every point with the Court below, as long as the Courts below have come to a reasonable decision on the evidence. This distinction in our opinion does not affect the position that the order pronounced by the High Court dismissing the petition of appeal or a criminal revision application *in limine* without issuing notice to the opposite party is merely an order dismissing the same on the ground that there is no *prima facie* case for interference of the High Court and does not amount to a judgment pronounced by the High Court after full hearing in the presence of both the parties which only can debar the High Court from exercising its revisional jurisdiction under section 439 (1). Mr. Justice Mahajan as he then was delivered a concurring judgment but went a step further and observed that the true interpretation of section 439 (6) was that it gave an unlimited right to the accused to whom a notice of enhancement was issued under section 439 (2) to show cause against his conviction and the Judge was bound to go into the evidence with a view to find for himself whether the conviction could be sustained. This right accrued to the convict on service of notice of enhancement of sentence and could not be negatived by anything that had preceded the issue of that notice. It was the Judge hearing the enhancement petition who had to give an opportunity to the convict to challenge his conviction before him and to satisfy him that the conviction was unsustainable. That Judge could not substitute for his satisfaction the satisfaction of some other Judge in the matter. It was a condition precedent to the passing of a prejudicial order against an accused person that he had another opportunity of establishing his innocence, even if he had failed to do so before. The learned Judge rightly observed that an order made in the exercise of an extraordinary discretionary jurisdiction, unless it be a judgment *in rem*, could not in any way operate as a bar to the decision of the same matter wherein it arose in the exercise of ordinary appellate jurisdiction, and that therefore an order dismissing a criminal revision application *in limine* could not amount to a judgment of the High Court. The learned Judge then invoked the principle of the finality of judgments and observed:—

"On the other hand if the view be correct that all orders passed in exercise of revisional jurisdiction whether they be of dismissal of the petition *in limine* or otherwise take away the right of the convict to challenge his conviction in view of section 369, Criminal Procedure Code, as in such cases a decision given already cannot be altered or reviewed, then I do not see how for purposes of enhancement of the sentence, the previous decision can be altered. Any Judge deciding a petition for revision under section 439 (1) must consider the propriety of the sentence as well as the propriety and legality of the conviction, and in my opinion he must be presumed to have done so. If a previous decision on the question of conviction bars the applicability of section 439 (6), it also bars the power to enhance the sentence. Once it has been held that the sentence was proper, it cannot be enhanced. I have not

been able to see the *ratio decidendi* of the decisions which take the view, that the question of enhancement of the sentence is something distinct and separate from that of conviction, and that the question of the adequacy and propriety of sentence which comes before the Court on a petition for revision presented by the accused is a matter different from the matter of enhancement. The Judge has to see if proper sentence has been passed before he decides the case, and the question whether a sentence passed is adequate or inadequate cannot be split up in two different compartments. The question is only one of the quantum of punishment and such a question can only be decided but once. Therefore in my view either there is no power of re-revision in the High Court, in that case there is no power to enhance the sentence on a separate petition made for the purpose ; or there is such a power in that case it is available to the Crown as well as to the accused."

This reasoning again was in our opinion sound but led only to the conclusion that there was no power of re-revision in the High Court and in that case there was no power to enhance the sentence on a separate petition made for the purpose. The learned Judge therefore ought to have held that if the order dismissing the criminal revision petition *in limine* tantamounted to a judgment pronounced by the High Court it was not open to the High Court to issue a notice for enhancement of sentence subsequently under section 439 (1) of the Criminal Procedure Code. Having held however that the order dismissing the criminal revision application *in limine* was merely an order and not a judgment pronounced by the High Court and also having held that the High Court was entitled to issue a notice for enhancement of sentence under section 439 (1), under those circumstances the only logical conclusion to which the Court could come was that under Section 439 (6) the accused while showing cause against the enhancement of sentence was entitled also to show cause against his conviction. Mr. Justice Mahajan confined his decision only to the case of a dismissal of a criminal revision application *in limine* and left open the question whether a decision on the Appellate Side of the High Court would bar the exercise of the right under Section 439 (6) inasmuch as no arguments were heard on the point. The principle of this judgment in our opinion is not confined merely to cases where a criminal revision application has been dismissed *in limine* but also extends to cases where a petition of appeal whether presented from jail or presented to the Court by the appellant or his pleader has been similarly dismissed summarily or *in limine* without issuing notice to the opposite party and also to cases of references made by the lower Courts to the High Court where the High Court has merely passed an order without issuing notices, to any of the parties concerned—"no order on this reference".

The Patna High Court in *Ramlakhan Chaudhry* v. *The King-Emperor*[1] followed both these decisions *Emperor* v. *Jorabhai*[2] and *Emperor* v. *Dhanalal*[3] in holding that the dismissal of an appeal by the High Court did not debar it from subsequently enhancing the sentence in the exercise of revisional jurisdiction after issuing notice to the accused. In that case an appeal had been dismissed after full hearing by the High Court. At the hearing of the appeal however the Court asked the counsel for the accused to show cause why the sentence passed upon them should not be directed to run consecutively thus in effect issuing a notice for enhancement of the sentence. When the matter came on for hearing it was contended on behalf of the accused that with the disposal of the appeal the Bench and indeed the High Court was *functus officio* and had no jurisdiction to hear the matter at all. This contention was repelled by observing that the appellate judgment was not concerned with the question of enhancement of the sentence which only arose in the exercise of the revisional jurisdiction and the sentence to be revised and enhanced was the sentence passed not by the

1. (1931) I.L.R. 10 Pat. 872.
2. (1926) I.L.R. 50 Bom. 783.
3. (1928) I.L.R. 10 Lah. 241.

High Court but by the Court of Sessions. These observations run counter to the observations of Mr. Justice Mahajan which we have quoted above and ignores the fact that once the High Court pronounced its judgment in the appeal after full hearing in the presence of both the parties the judgment of the High Court replaced that of the lower Court and the High Court had thereafter no power to issue a notice of enhancement of sentence purporting to exercise the revisional powers vested in it under Section 439 (1) of the Criminal Procedure Code which could be exercised only qua the judgments of the lower Courts and not its own judgments.

The Allahabad High Court also in *Emperor* v. *Naubat*[1] followed the decision of that Court which had approved of and followed *Emperor* v. *Jorabhai*[2] and repelled the contention which had been urged on behalf of the accused that the application in revision filed by the Government for enhancement of their sentence was incompetent, because their appeal from their convictions had been dismissed by the Court and it was not open to them again to show cause against their convictions. The decisions above referred to were held by the Court to be an authority for the proposition that the Court could under the circumstances proceed to consider whether the sentence imposed upon the accused should be enhanced, even though it was not open to the accused to show cause against their conviction. This decision was in our opinion not correct for the simple reason that once the judgment of the Appellate Court replaced that of the lower Court it was not competent to the High Court to issue a notice for enhancement of sentence in the exercise of its revisional jurisdiction under Section 439 (1) and no question could therefore arise of the accused being called upon to show cause why their sentence should not be enhanced.

The High Court of Rajasthan in *The State* v. *Bhawani Shankar*[3] tried to reconcile the various points of view above noted by laying stress on the aspect of the accused having had an opportunity to show cause against his conviction and it observed that where an accused person had already been heard and thus given an opportunity to show cause against his conviction, whether it be in appeal or in revision and whether the dismissal was summary or on the merits, he could not be heard against his conviction a second time under Section 439 (6) as the principle of finality of orders in criminal proceedings would apply. But if the accused had not been heard at all and given no opportunity to show cause against his conviction and his jail appeal had been dismissed under Section 421 of the Criminal Procedure Code, or his revision had been dismissed without hearing, he was entitled to ask the Court to hear him and thus allow him to show cause against his conviction under Section 439 (6), if a notice of enhancement was issued to him. The real question however in our opinion is not whether an opportunity has been given to the accused to show cause against his conviction at any time but whether the High Court is entitled to exercise its revisional powers under Section 439 (1) and issue a notice of enhancement of sentence upon the accused. If the accused had an opportunity of showing cause against his conviction either in an appeal or a criminal revision application filed by him or on his behalf and the conviction was confirmed on a full hearing in the presence of both the parties after the issue of the requisite notice by the Court to the opposite party the judgment of the High Court would replace that of the lower Court which judgment could not be reviewed or revised by the High Court at all in exercise of its revisional powers under Section 439 (1). If however an order dismissing the petition of appeal or criminal revision application or even a reference

1. I.L.R. (1945 All. 527.
2. (1926) I.L.R. 50 Bom. 783
3. I.L.R. (1952) 2 Raj. 716.

made by the lower Court was made dismissing the same summarily or *in limine* without issuing notice to the opposite party or the parties concerned it would tantamount to the High Court not entertaining any of these proceedings on the ground that no *prima facie* case had been made out for the interference of the Court. If such a *prima facie* case had been made out the High Court would admit the appeal or the revision application or entertain the reference and hear the matter fully in the presence of both the parties, ultimately pronouncing its judgment which would take the place of the judgment of the lower Court which would certainly not be subject to the exercise of revisional jurisdiction under Section 439 (1) of the Criminal Procedure Code. We are of the opinion that the conclusion reached by the High Court of Rajasthan was correct and the accused in that case was rightly allowed by it to show cause against his conviction in spite of his petition of appeal from jail having been dismissed by it summarily, though we differ from the reasoning adopted by the Court in reaching that conclusion. Section 439 (6) gives the accused a right to show cause against his conviction. It does not merely give him an opportunity to show cause against the same. The opportunity is given to him to show cause against the enhancement of sentence under Section 439 (2) of the Criminal Procedure Code and once he has got that opportunity, while showing cause against the enhancement of his sentence he has a right to show cause against his conviction which right he can exercise whether he had on an earlier occasion an opportunity of doing so or not. The real test is not whether the accused has had an opportunity of showing cause against his conviction but whether a judgment of the High Court pronounced after a full hearing in the presence of both the parties after notice issued in that behalf has replaced the judgment of the lower Court. If the judgment of the lower Court is so replaced there is no occasion at all for the exercise of the revisional powers under Section 439 (1) of the Criminal Procedure Code If however no such judgment has replaced that of the lower Court the High Court has got the power to issue a notice for enhancement of the sentence and the accused has, in spite of whatever has happened in the past, while showing cause against the notice of enhancement also the right to show cause against his conviction.

The right which is thus conferred upon the accused under Section 439 (6) cannot be taken away by having resort to the principle of finality of judgments incorporated in Section 369 of the Criminal Procedure Code. As we have observed above that principle comes into operation when once a judgment of the High Court has replaced that of the lower Court and in those cases the High Court would not be competent to review or revise its own judgment. The High Court would also not be then entitled to issue any notice for enhancement of sentence in the exercise of its revisional powers under Section 439 (1) of the Criminal Procedure Code. Where however the High Court in exercise of its revisional power over the judgments of the lower Courts under Section 439 (1) issues a notice for enhancement of sentence and gives an opportunity to the accused of being heard either personally or by pleader in his own defence under section 439 (2) the right which is given by section 439 (6) to him also to show cause against his conviction comes into existence and this right of his cannot be negatived by having resort to the provisions of either section 369 or section 430 of the Criminal Procedure Code. Section 369 in terms provides, "save as otherwise provided in this Code" and section 439 (6) would be an otherwise provision which is saved by this *non-obstante* clause appearing in section 369. It is significant to note that both these amendments, the one in section 369 and the other in section 439 were enacted by section 119 of Act XVIII of 1923 and the very purpose of

these simultaneous amendments would appear to be to effectuate the right given to the accused to show cause against his conviction as enacted in section 439 (6) of the Criminal Procedure Code.

It may also be noted that the right which is thus conferred on the accused under section 439 (6) is not an unlimited or unfettered right as observed by Mr. Justice Mahajan in *Emperor* v. *Atta Mohammad*.[1] In the case of trials by jury where an accused person has been convicted on the verdict of a jury and is called upon under section 439 (2) of the Criminal Procedure Code to show cause why his sentence should not be enhanced he is entitled under section 439 (6) to show cause against his conviction, but only so far as section 423 (2) of the Code allows and has not an unlimited right of impugning the conviction on the evidence. It has been held by the Allahabad High Court in *Emperor* v. *Bhishwanath*,[2] that the combined effect of sections 439 (6) and 423 (2) is to entitle the accused to question the conviction by showing only that the Judge misdirected the jury or that the jury misunderstood the law laid down by the Judge in his charge.

A similar conclusion was reached by the majority of the Judges in *The Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Jnanendra Nath Ghose & another*,[3] where it was held that a person who had been convicted on his own plea of "guilty" under section 271 (2) of the Criminal Procedure Code, in showing cause against a notice for enhancement of sentence, could only while showing cause against his conviction attack the propriety or legality of sentence but could not withdraw the plea of 'guilty' or go behind such a plea as a confession of the facts charged.

There are no doubt two other judgments, one of the Bombay High Court in *Emperor* v. *Ramachandra Shankarshet Uravane*,[4] and the other of the Rangoon High Court in *Nga Ywa and another* v. *King-Emperor*,[5] which appear to run counter to the *ratio decidendi* of these decisions of the Allahabad and the Calcutta High Courts respectively but we are not called upon to resolve that conflict, if any. Suffice it to say that the right which is conferred on the accused of showing cause against his conviction under section 439 (6) of the Criminal Procedure Code is a right which accrues to him on a notice for enhancement of sentence being served upon him and he is entitled to exercise the same irrespective of what has happened in the past unless and until there is a judgment of the High Court already pronounced against his conviction after a full hearing in the presence of both the parties on notice being issued by the High Court in that behalf. This right of his is not curtailed by anything contained in the earlier provisions of section 439 nor by anything contained in either section 369 or section 430 of the Criminal Procedure Code.

We are therefore of the opinion that the decision reached by the High Court of Bombay in the case under appeal was wrong and must be reversed. We accordingly allow the appeal and remand the matter back to the High Court of Judicature at Bombay with a direction that it shall allow the Appellant to show cause against his conviction and dispose of the same according to law.

BY THE COURT.

The appeal is allowed and the order of the High Court of Bombay is set aside, and the matter is sent back to the High Court with a direction that it shall allow the appellant an opportunity to show cause against his conviction and dispose of the matter according to law.

Appeal allowed.

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1. (1943) I.L.R. 25 Lah. 391 (F.B.)
2. I.L.R. (1937) All. 308.
3. (1929) 33 C.W.N. 599.
4. (1932) 35 Bom.L.R. 174.
5. (1934) I.L.R. 12 Rang. 616.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—VIVIAN BOSE, N. H. BHAGWATI, B. JAGANNADHADAS, T. L. VENKATARAMA AYYAR, B. P. SINHA AND SYED JAFFER IMAM, JJ.

Om Prakash Gupta .. *Appellant**

v.

The State of Uttar Pradesh .. Respondent.

Civil Service (Classification Control and Appeal) Rules (1930), *Rule* 55—*Order of dismissal of Civil servant—Suit for declaration that the order was illegal and for recovery of arrears of salary and in the alternative damages—Subsequent amendment deleting alternative claim for damages—Refund of excess Court-fee paid on such alternative claim—If can be ordered—Order of suspension pending enquiry—If subsists after an order of dismissal had been passed.*

A civil servant who has been illegally dismissed is entitled to recover arrears of salary. *The State of Bihar* v. *Abdul Majid.*[1] Where there was an alternative claim for damages and Court-fee had been paid on such claim a subsequent decision of the Privy Council clarifying the position that a person illegally dismissed from Government service could only get a declaration that the order was inoperative and that he still continued to be a member of the Civil Service, could not be a ground for refund of Court-fee (paid on the claim for damages) on deleting that claim on a subsequent amendment. Where as the result of the inquiry an order of dismissal by way of penalty was passed against a civil servant, the order of suspension made against him pending the enquiry lapsed with that. The subsequent declaration by a Civil Court that the order of dismissal was illegal could not revive an order of suspension which did not exist.

Appeal under Article 133 (1) (*c*) of the Constitution from the Judgment and Decree, dated the 6th November, 1950, of the High Court of Judicature at Allahabad in F.A. No. 141 of 1949.

S. Ramaswamy Iyer, Senior Advocate (*K. R. Choudhry,* Advocate, with him) for Appellant.

M. C. Setalvad, Attorney-General for India (*C. P Lal,* Advocate, with him) for Respondent.

The Judgment of the Court was delivered by

Imam, J.—This is an appeal against the decision of the Allahabad High Court affirming the decision of the Civil Judge of Allahabad.

The appellant was appointed to the United Provinces Civil (Executive) Service in 1940 and in due course was confirmed. He was posted to various stations and in 1944 he was posted to Lakhimpur Kheri, where he joined in July, 1944. On the 23rd August, 1944, the Deputy Commissioner of Lakhimpur Kheri received a telegram from Government informing him that the appellant was suspended forthwith pending inquiry into his conduct and that a copy of the telegram was forwarded to the appellant for information. On the 26th August, 1944, the Deputy Commissioner wrote to the appellant that he was required to appear before the Commissioner of the Lucknow Division on the 28th August, 1944, to answer the charges, a copy of which would be forwarded to him. He further informed the appellant that he could treat his case under rule 55 of the Civil Services (Classification, Control and Appeal) Rules of 1930, published in the United Provinces Gazette of June 28, 1930. The appellant was further informed that in view of his suspension his leave application was cancelled. On the 28th August, 1944, the appellant appeared before the Commissioner at Lucknow and protested against the procedure adopted by him for the inquiry. The Commissioner having completed the inquiry on the 1st September, 1944, submitted his report to Government. The Commissioner, however, recommenced the inquiry on September 11, 1944, and after com-

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* C.A. No. 85 of 1954. 21st April, 1955.

1. 1954 S.C.R. 786 : 1954 S.C.J. 300.

pleting the inquiry submitted the papers to Government on the 30th September, 1944. The Government of the United Provinces by an order, dated the 25th November, 1944, dismissed the appellant from the United Provinces Civil (Executive) Service. This order was served on the appellant on the 1st December, 1944, and he submitted a memorial to the Governor on August 7, 1945, which was rejected on the 28th May, 1947. During the period of suspension the appellant was paid subsistence allowance at the rate of one-fourth of his salary which was then Rs. 310 per month.

The appellant gave notice under section 80 of the Code of Civil Procedure of his intention to bring a suit and on the 2nd January, 1948, he filed his suit. He asked for a declaration that the order of dismissal was wrongful, illegal, void and inoperative and that he still continued to be a member of the Civil Service entitled to full pay with all increments as they fell due. He prayed for a decree for recovery of arrears of salary amounting to Rs. 16,810-8-0 less subsistence allowance already drawn from August 24, 1944, to December 31, 1947. In the alternative he prayed for a declaration that the order of dismissal was wrongful and that a decree to the extent of Rs. 1,20,000 with interest by way of damages may be passed in his favour. He paid the requisite court-fee on the valuation of Rs. 1,20,000. This alternative claim was deleted from the plaint as a result of an amendment, having regard to a subsequent decision of the Privy Council which held that a person illegally dismissed from Government service could only get a declaration that the order was inoperative and that he still continued to be a member of the Service.

The appellant asked for refund of the extra Court-fee paid which was rejected by the Civil Judge by a separate order. The Civil Judge, however, decreed the appellant's suit in part declaring that the order dismissing him from service was illegal and that he still continued to be a member of the United Provinces Civil (Executive) Service. The Civil Judge, however, declined to pass a decree for arrears of salary.

Against the decision of the Civil Judge the appellant appealed to the High Court and his appeal was dismissed. The respondent did not appeal against the decision of the Civil Judge or file a cross-objection. The appeal in the High Court proceeded on the basis that the order of dismissal made against the appellant was illegal and that it was rightly declared that he continued to be a member of the service of the United Provinces Civil (Executive) Service. The only two questions which were considered and decided by the High Court were as to whether the appellant was entitled to a decree for arrears of salary and a refund of the excess Court-fee paid by him. Both these questions were decided against the appellant by the High Court which subsequently gave him a certificate for leave to appeal to this Court. It may be stated at once that in view of the decision of this Court in *The State of Bihar* v. *Abdul Majid*,[1] there can be no question now that the appellant had the right to institute a suit for recovery of arrears of salary as he was dismissed illegally. It is unnecessary, therefore, to refer to the elaborate discussion of the law in this respect to be found in the judgment of the learned Judges of the High Court.

When this appeal came on for hearing before this Court and the appellant had been heard, the Attorney-General in the course of his argument had contended that the order of suspension of August, 1944, subsisted although the order of dismissal had been declared illegal by the Civil Judge and all that the appellant was entitled to was subsistence allowance and not salary so long as the order of suspension remained effective. This plea was not taken in the written statement filed in the trial Court, nor was there any issue framed in this respect. The

1. 1954 S.C.R. 786 : (1954) S.C.J. 300.

Attorney-General asked for time to file an additional written statement on behalf of the respondent. This Court allowed time for the respondent to do so and the appellant was also given time to reply to any additional written statement filed on behalf of the respondent. The respondent filed the additional written statement and the appellant filed his reply to it. Thereafter the appeal came on for hearing again and the learned Advocate for the appellant made his submissions on the additional written statement and the Attorney-General replied to the same.

So far as the payment of excess Court-fee is concerned, the learned Advocate for the appellant did not urge this point in his opening argument but urged it in reply after the Attorney-General had concluded his argument. Apart from the question as to whether the advocate can be allowed to urge a point like this in reply when no submission had been made by him in his opening, it seems there is no merit in the submission made by the advocate. The Court-fee had been paid on Rs. 1,20,000 which was claimed as damages. At the time the suit was instituted the law as then understood permitted such a claim to be made. The decision of the Privy Council, however, made it clear that no such claim could be made and all that a Government servant could ask for was a declaration that the order of dismissal was illegal and that he still continued to be a member of the Civil Service. The decision of the Privy Council clarifying the position could not be a ground for refund of Court-fee when at the time it was paid it was in accordance with the law as then understood. Indeed the appellant did not appeal or file an application against the order of the Civil Judge refusing to pass an order of refund. In the High Court he did not ask for this relief on the basis of any statutory provision. He invoked the inherent powers of the High Court. The Court-Fees Act contains certain provisions for refund of Court-fee paid by a party but admittedly the present case is not covered by any of those provisions. It seems, therefore, that the High Court in the circumstances of the present case rightly refused to order a refund of the excess Court-fee paid by the appellant. It also does not appear that the Civil Judge acted illegally in refusing to order a refund.

On the additional written statement filed in this Court by the respondent a question has arisen whether the order of suspension was valid and during the period it was in force the appellant could recover arrears of salary. The learned advocate for the appellant contended that an order of suspension is a penalty under rule 49 of the Classification Rules and it was against all sense of natural justice to impose a penalty upon a Government servant pending an inquiry against him under rule 55 of the said Rules. An order imposing the penalty of suspension was an appealable order under rule 56 of the Classification Rules and under rule 59 of the said rules, an appellate authority was bound to consider whether the facts on which the penalty was imposed had been established and whether those facts disclosed sufficient grounds for imposing such a penalty. Rule 54 of the Fundamental Rules authorises a revising or an appellate authority, when it finds that the penalty of suspension was unjustified or not wholly justified, to make an order granting to the Government servant his full pay and any allowance to which he was entitled if he was honourably acquitted and in other cases such proportion of pay and allowances as it may prescribe. The penalty of suspension, it was urged, involved serious loss in the matter of salary and allowances and to impose this penalty pending an inquiry was to prejudge the case against a Government servant and in effect to make his right of appeal a meaningless remedy. It was pointed out that in some of the Rules framed by a Government or quasi-Government authority the penalty of suspension pending an inquiry was specifically provided for, such as Rule 95 of the Bihar and Orissa Service Code referred to in *Abdul Majid's case*[1] and rule 1711 of the Indian Railway Establishment Code. On behalf of the appellant reference was also made

1. (1954) S.C.R. 786 : (1954) S.C.J. 300.

to certain decisions to the effect that as between master and servant, the master had no power of suspension unless there was an express term to that effect in the contract between them.

The Attorney-General conceded that apart from the Classification Rules and the Fundamental Rules he was not aware of any other Rules under which the penalty of suspension could be imposed upon a Government servant. He also conceded that under the Classification Rules an order of suspension was a penalty. He further conceded that as between master and servant the former had no power of suspension unless the terms of the contract between them permitted it or a statute or a rule provided for it but this principle, he said, did not apply to a person in the service of the Crown in India. He, however, contended that under rule 49 of the Classification Rules a penalty of suspension could be imposed pending an inquiry. There was nothing in the rule itself which enjoined that a penalty could only be imposed at the conclusion of an inquiry. The penalty could be imposed for good and sufficient reasons which may be based on materials already existing pending an inquiry. After the inquiry there may be the imposition of a severer penalty or a definite period of suspension may be fixed or there may be cancellation of the order of suspension. No doubt there was a right of appeal against an order imposing a penalty of suspension pending an inquiry but the provisions of rule 54 of the Fundamental Rules did not necessarily lead to the conclusion that the penalty of suspension could only be imposed after an inquiry. Clause (*a*) of the said rule might contemplate a case where the penalty had been imposed after an inquiry but clause (*b*) could cover a case where the penalty had been imposed pending an inquiry. In the present case, he said, there was no contravention of any principle of natural justice as the appellant had an opportunity of explaining the accusation made against him. The letter of the Commissioner of Lucknow Division with its annexure, marked Exhibit A in the trial Court, clearly showed that the Deputy Commissioner, Lakhimpur Kheri had recorded statements of persons with reference to three cases and the appellant saw him in connection therewith. He admitted the facts but tried to explain them. He, however, declined to give his statement in writing. The order of suspension made against him was based on materials of which he was fully aware.

In the alternative the Attorney-General urged that in the year, 1944, the appellant was a member of the Civil Service of the Crown in India holding office during the pleasure of the Crown. There was, therefore, inherent power in the Crown and its representative to pass an order of suspension against the appellant pending an inquiry. The Classification Rules and Fundamental Rules were merely directions for general guidance and they did not constitute a contract between the Crown and its servants. For this proposition he referred to the observations of Lord Hobhouse in the case of *Shenton* v. *Smith*.[1] He also relied upon the following observations of Lord Roche in the case of *R. Venkata Rao* v. *Secretary of State for India in Council*.[2] "Section 96-B in express terms states that office is held during pleasure. There is, therefore, no need for the implication of this term and no room for its exclusion. The argument for a limited and special kind of employment during pleasure but with an added contractual term that the rules are to be observed is at once too artificial and too far-reaching to commend itself for acceptance. The rules are manifold in number and most minute in particularity, and are all capable of change. ....
....Inconvenience is not a final consideration in a matter of construction, but it is at least worthy of consideration, and it can hardly be doubted that the suggested procedure of control by the Courts over

1. L.R. [1895] A.C. 229.
2. (1936) L.R. 64 I.A. 55 : I.L.R. (1937) Mad. 532 : (1937) 1 M.L.J. 529 (P.C.)

Government in the most detailed work of managing its services would cause not merely inconvenience but confusion".

In the Courts below the principal question for consideration was whether the appellant could recover arrears of salary having been illegally dismissed. It was not pleaded that the order of suspension was valid and during the period it was in force the appellant could not recover arrears of salary and no specific issue was framed in this respect. If the decision of this Court in *Abdul Majid's case* had been available to the Courts below, they would have held that the appellant was entitled to recover arrears of salary when he had been illegally dismissed and they would have had further to decide whether the order of suspension was valid and during the period it was in force the appellant could recover arrears of salary. On the additional written statement filed by the respondent in this Court, the submissions of the advocate for the appellant and the Attorney-General would require examination and it might have been necessary to consider whether the case should not be remanded to the Court of trial. It is unnecessary, however, to record a decision on these submissions having regard to the attitude adopted by the advocate for the appellant. He objected to the case being remanded as such a course would involve the appellant in heavy expenditure and harassment. The appellant preferred to give up his claim for arrears of salary less subsistence allowance paid to him from the date of the order of suspension until the date of the order of dismissal. He, however, contended that the order of suspension continued to be in force only until the 25th November, 1944, the date of the order of dismissal. On that date the order of suspension ceased to exist and the appellant was entitled to recover arrears of salary from the 25th November, 1944, to the 31st December, 1947, inclusive. The Attorney-General strongly contended that it continued to be in force and that it was not at all affected by the declaration of the Civil Judge that the order of dismissal was illegal. In view of that decision the order of dismissal must be regarded as a nullity and non-existent in the eye of law. The inquiry, the outcome of which was the order of dismissal, had not therefore ended. It could only end with a valid order which would replace the order of suspension. Until that happened the accusation against the appellant remained and the inquiry had not ended. He referred to the case of *M. Gopalkrishna Naidu* v. *State of Madhya Pradesh*.[1] On behalf of the appellant reliance was placed on the case of *Provincial Government, Central Provinces and Berar through Collector, Amraoti* v. *Shamshul Hussain Siraj Hussain*.[2] The order of suspension made against the appellant was clearly one made pending an inquiry. It certainly was not a penalty imposed after an enquiry. As the result of the inquiry an order of dismissal by way of penalty had been passed against the appellant. With that order, the order of suspension lapsed. The order of dismissal replaced the order of suspension which then ceased to exist. That clearly was the position between the Government of the United Provinces and the appellant. The subsequent declaration by a Civil Court that the order of dismissal was illegal could not revive an order of suspension which did not exist. The case referred to by the Attorney-General is not directly in point and that decision does not conflict with the case relied upon by the appellant. The appellant is, therefore, entitled to recover arrears of salary from the 25th of November, 1944, to 31st December, 1947.

The appeal is accordingly allowed in part with costs throughout and the decree of the Courts below is set aside. The plaintiff's suit is decreed for arrears of salary from the 25th of November, 1944, to the 31st of December, 1947, inclusive. The appellant had claimed Rs. 16,810-8-0 less subsistence allowance already drawn as arrears of pay from the 24th of August, 1944, to the 31st December,

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1. A.I.R. 1952 Nag. 170. 2. A.I.R. (1949) Nag. 118 ; I.L.R. (1948) Nag. 576.

1947. As his claim for arrears of salary from the 24th of August, 1944, to the 25th of November, 1944, is given up, the total salary payable to him during this period less subsistence allowance already drawn, must be deducted from the sum of Rs. 16,810-8-0. The judgment of the High Court as well as the additional written statement filed by the respondent in this Court show that subsequent to the decree passed by the Civil Judge the appellant was treated as under suspension until he was dismissed by a fresh order of dismissal and that he has been paid subsistence allowance for the entire period. Such subsistence allowance as has been paid to the appellant from the 25th of November, 1944, to the 31st December, 1947, inclusive, must, therefore, be credited to the respondent and the same must be adjusted against the salary claimed by the appellant. A decree will accordingly be prepared stating the amount recoverable by the appellant.

The appellant was permitted to appeal *in forma pauperis*. As he has succeeded in the appeal, the Registrar shall calculate the amount of court-fee which would have been paid by the appellant if he had not been allowed to appeal as a pauper and incorporate it in the decree. The court-fee shall be payable by the appellant but the Union Government will recover it from the Uttar Pradesh Government who will adjust the sum paid against the total amount payable under the decree. It will be a first charge on the amount decreed to the appellant. Under Rule 7 of Order 14 of the Rules of this Court the appellant will be allowed the fees paid by him to his advocates in the taxation of costs.

Appeal allowed in part.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—VIVAN BOSE, B. JAGANNADHADAS AND B. P. SINHA, JJ.

The Delhi Cloth and General Mills, Co. Ltd. .. *Appellant**

v.

Harnam Singh and others .. *Respondents.*

Private International Law—Debt situate in Lyallpur (now in Pakistan)—Creditor leaving for India—Defendant in Delhi—Pakistan Evacuee Property Ordinance freezing the debt and making the debtor pay the amount to Custodian of Evacuee Property—Plaintiffs' suit in India—Defendants' liability—Law applicable.

Before partition of India the plaintiffs who were partners in a firm carried on business of cotton cloth dealers at Lyallpur which is now in Pakistan. The defendant the Delhi Cloth and General Mills Co., Ltd., is a registered company carrying on business at Delhi and other places and has its head office at Delhi. One of the places at which it carried on business before the partition was at Lyallpur. In the course of the business plaintiffs used to make lump sum payments to the defendant against their purchases. In respect of such dealings a balance of Rs. 11,496-6-6 remained due to the plaintiffs as on 28th July, 1947. In the suit to recover the amount with interest the defendant contended that when India was partitioned on 15th August, 1947, Lyallpur, where the transactions took place and where the money situate was assigned to Pakistan. The plaintiffs fled to India at this time and became evacuees and the Pakistan Government froze all evacuee assets and later compelled the defendant to hand them over to the Custodian of Evacuee Property in Pakistan and so that the defendant was unable to pay the debt unless it was released by the Pakistan Government.

Held: In the circumstances it is reasonable to assume as in the case of banking and insurance that on the termination of the contract the balance was to be paid at Lyallpur and not elsewhere. That localises the place of primary obligation. The proper law of the contract, in so far as that is material, was the Lyallpur Law. Whether the proper law of the contract applies or the English Law of *situs* in a case of this kind, the defendant is exonerated because, the debt being "property," the Pakistan Evacuee Property Ordinance divested the plaintiffs of ownership in it and vested the debt in the

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* Civil Appeal No. 200 of 1954. 21st April, 1955.

Custodian and at the same time interfered with the obligation for performance by providing that payment to the Custodian shall operate as a discharge of the obligation.

[The question as to what would happen in a case where there is no payment to the Custodian and the defendant has no perishable assets in Pakistan out of which the West Punjab Government could realise the debt by attachment of the defendants property was left open.]

The Pakistan Evacuee Property Ordinance cannot be condemned as being opposed to public policy and that legislation is not confiscatory.

Appeal from the Judgment and Decree dated the 6th day of December, 1951 of the Circuit Bench of the Punjab High Court at Delhi in Regular First Appeal No. 72 of 1952 arising out of the Judgment and Decree dated the 14th day of April, 1952 of the Court of Subordinate Judge, Delhi, in Suit No. 657 of 1950.

N. C. Chatterjee, Senior Advocate (*Tarachand Brij Mohan Lal* and *B. P. Maheswari*, Advocates, with him) for Appellant.

R. S. Narula, Advocate, for Respondents.

The Judgment of the Court was delivered by

Bose, J.—The defendant appeals.

The plaintiffs were the partners of a firm known as Harnam Singh Jagat Singh. Before the partition of India they carried on the business of cotton cloth dealers at Lyallpur which is now in Pakistan.

The defendant is the Delhi Cloth and General Mills Co., Ltd. It is a registered company carrying on business at Delhi and other places and has its head office at Delhi. One of the places at which it carried on business before the partition was Lyallpur.

The plaintiffs' case is that they carried on business with the defendant company for some three or four years before 1947 and purchased cloth from the company from time to time. In the course of their business they used to make lump sum payments to the defendant against their purchases. Sometimes these were advance payments and at others the balance was against them. When there was an adverse balance the plaintiffs paid the defendant interest: see the plaintiff Sardari Lal as P.W. 3.

On 28th July, 1947, the account stood in the plaintiff's favour. There was a balance of Rs. 79-6-6 lying to their credit plus a deposit of Rs. 1,000 as security. On that day they deposited a further Rs. 55,000 bringing the balance in their favour up to Rs. 56,079-6-6.

The defendant company delivered cloth worth Rs. 43,583-0-0 to the plaintiffs against this amount at or about that time. That left a balance of Rs. 11,496-6-6. The suit is to recover this balance plus interest.

The claim was decreed for Rs. 12,496-6-6 and this was upheld on appeal to the High Court. The defendant appeals here.

The defendant admits the facts set out above but defends the action on the following ground. It contends that when India was partitioned on 15th August, 1947, Lyallpur, where these transactions took place and where the money is situate, was assigned to Pakistan. The plaintiffs fled to India at this time and thus became evacuees and the Pakistan Government froze all evacuee assets and later compelled the defendant to hand them over to the Custodian of Evacuee Property in Pakistan. The defendant is ready and willing to pay the money if the Pakistan Government will release it but until it does so the defendant contends that it is unable to pay and is not liable. The only question is, what are the rights and liabilities of the parties in those circumstances? The amount involved in this suit, though substantial, is not large when compared with the number of claims by and against persons in similar plight. The defendant itself is involved in many similar transactions. A list of them appears in Exibit D-11. Mohd. Bashir Khan, D.W.

1, says that the total comes to Rs. 1,46,209-1-9. The defendant has accordingly chosen to defend this action as a test case.

The further facts are as follows. At the relevant period, before the partition, cloth was rationed and its distribution controlled in, among other places, the Punjab where Lyallpur is situate. According to the scheme, quotas were allotted to different areas and the manufacturers and suppliers of cloth could only distribute their cloth to retailers in accordance with those quotas, and the dealers in those areas could only import cloth up to and in accordance with those quotas allotted to them. If the suppliers themselves had a retail shop or business in a given area, then the quota for that area was divided between the supplier and a Government quota-holder or quota-holders called the nominated importer or importers. The local agency of the suppliers was permitted to import up to the portion of the quota allotted to it in that area and the suppliers were obliged to give the balance of the quota to the Government quota-holder or holders. The plaintiffs were the Government quota-holders for Lyallpur and the defendant company also carried on business there through the General Manager of the Lyallpur Mills.

It is admitted that the defendant owns these mills but it is a matter of dispute before us whether the mills are a branch of the defendant company; but whatever the exact status of the Lyallpur mills may be, it is clear from the evidence and the documents that the General Manager of these mills conducted the defendant's cotton business at Lyallpur.

It seems that the details of the cloth distribution scheme for Punjab, in so far as it affected the defendant company, were contained in a letter of the 24th October, 1945, from the Secretary, Civil Suplies Department, Punjab. That letter has not been filed and so we do not know its exact contents but reference to it is found in a series of letters written by the defendant company from Delhi to the District Magistrate at Lyallpur. Those letters range in date from 3rd January, 1946 to 19th April, 1947: (Exs. P-5 to P-12). They are all in the same form, only the figures and dates differ. It will be enough to quote the first, Ex. P-5. It is dated 3rd January, 1946 and is from the Central Marketing Organisation of the defendant company, the Delhi Cloth and General Mills Co., Ltd. It is written from Delhi to the District Magistrate, Lyallpur, and is as follows:

"The District Magistrate, Lyallpur.

Re : Cloth Distribution Scheme.

Dear sir,

Ref: Letter No. 15841-CL-(D)-45/8342 of 24th October, 1945, from Secretary, Civil Supplies, Department, Punjab Government, Lahore.

Kindly note that we have allotted 28 bales for your district for the month of January, 1946. Out of this a quantity of 18 bales will be despatched to our Retail stores in your district/State and the balance of 10 bales will be available for delivery to your nominated importer.

We shall be obliged if you kindly issue instructions to your nominated importer to collect these goods from us within 15 days of the two dates for delivery fixed, namely by the 20th January and 5th of February, 1946, respectively. It may be noted that the first half quota will lapse in case delivery is not taken by you by the former date and the second half will lapse if not taken by the latter date.

Yours faithfully,
D.C. & Gen. Mills Co. Ltd."

In each case a copy was sent to the plaintiffs marked as follows:

"Copy to nominated importer—
Jagat Singh Harnam Singh,
Cloth Merchants,
Lyallpur."

The Indian Independence Act, 1947 was passed on 18th July, 1947 and the district of Lyallpur was assigned to Pakistan subject to the award of the Boundary

Commission. Then followed the partition on 15th August, 1947 and at or about that time the plaintiffs fled to India. This made them evacuees according to a later Ordinance. But before that Ordinance was promulgated the Assistant Director of Civil Supplies, who was also an Under Secretary to the West Punjab Government, wrote to the defendant's General Manager at Lyallpur (the General Manager of the Lyallpur Cloth Mills) on 17th February, 1948 and told him that—

"The amount deposited by the non-Mu lim dealers should not be refunded to them till further orders." (Ex. D-1).

The defendant did all it could, short of litigation, to protest this order and to try and get it set aside. Its General Manager at Lyallpur wrote letters to the Assistant Director of Civil Supplies on 14th April, 1948, 9th August, 1949 (Exs. D-2 and D-4), 23rd April, 1949 (Ex. D-7) and 6th June, 1949 (Ex. D-8), but the replies were unfavourable. On 30th April, 1948, the Assistant Director said that "in no case" should the sums be refunded (Ex. D-3) and on 1st November, 1948, directed that these amounts should be deposited with the Custodian of Evacuee Property (Ex. D-5). This was in accordance with an Ordinance which was then in force. Later, on 8th November, 1948, the General Manager received orders from the Deputy Custodian that the moneys should be deposited with the Deputy Custodian (Ex. D-6) and on 23rd June, 1949, these orders were repeated by the Custodian (Ex. D-9).

Meanwhile, the plaintiffs, who by then had shifted to Delhi, made a series of demands on the defendant in Delhi for payment. These are dated 3rd January, 1949 (Ex. P.W. 4|4), 27th January, 1949 (Ex. P.W. 4|1), 11th March, 1949 (Ex. P.W. 4|3) and 26th March, 1949 (Ex. P.W. 4|2). The defendant's attitude is summed up in its letter to the plaintiffs, dated 12th February, 1949 (Ex. P-3). The defendant said that it had received orders from the West Punjab Government, through the Assistant Director of Civil Supplies, not to make any refunds without the orders of the West Punjab Government.

On 15th October, 1949, the Ordinance of 1948 was replaced by Ordinance No. XV of 1949 (Ex. D-26), but that made no difference to the law about evacuee funds and properties.

On 4th July, 1950, the plaintiffs served the defendant with a notice of suit (Ex. P-14). This notice was forwarded to the defendant's General Manager at Lyallpur by the defendant's Managing Director in Delhi urging the General Manager to try and obtain the sanction of the West Punjab Government for payment of the money to the plaintiffs; and on 27th July, 1950, the defendant wrote to the plaintiffs saying—

"We confirm that the sum of Rs. 11,496-6-6 and Rs. 1000 are due to you on account of your advance deposit and security deposit respectively with our Lyallpur Cotton Mills, Lyallpur and the sum will be refunded to you by the said Mills as soon as the order of prohibition to refund such deposits issued by the West Punjab Government and served upon the said Mills is withdrawn or cancelled, and that your claim shall not be prejudiced by the usual time limit of three years having been exceeded." (Ex. P-4).

The defendant's reply did not satisfy the plaintiffs, so they instituted the present suit on 16th December, 1950.

After the suit, the defendant's Managing Director wrote personally to the Joint Secretary to the Government of Pakistan on 2nd April, 1951 but was told on 21st April, 1951, that the matter had been carefully examined and that the money must be deposited with the Custodian (Ex. D-25). A second attempt was made on 30th April, 1951 (Ex. D-24) and the Joint Secretary was again approached. Soon after, an Extraordinary Ordinance was promulgated on 9th May, 1951 (Ex. D-27) exempting "cash deposits of individuals in banks" from the operation of the main Ordinance. But the Joint Secretary wrote on 2nd June, 1951, that this

did not apply to private debts and deposits and again asked the defendant to deposit the money with the Custodian (Ex. D-23). Finally, the Custodian issued an order on 6th November, 1951, directing that the deposits be made by the 15th of that month, "failing which legal action will have to be taken against you". (Ex. D-10). The money was deposited on 15th November, 1951, on the last day of grace (Ex. D-12).

The first question that we must determine is the exact nature of the contract from which the obligation which the plaintiffs seek to enforce arises. The sum claimed in the suit, aside from the interest, is made up of three items:

(1) Rs. 79-6-6 outstanding from a previous account;

(2) Rs. 11,496-6-6 being the balance of a sum of Rs. 55,000 deposited on 28th July, 1947; and

(3) Rs. 1,000 as security.

The three items appear to be linked up but we will, for the moment, concentrate on the largest, the deposit of Rs. 55,000. Both sides have spoken of it as a "deposit" throughout but we will have to examine its exact nature because deposits are of various kinds and it will be necessary to know which sort this was before we can apply the law.

Unfortunately, the evidence is meagre and scrappy, so we have been obliged to piece much disjointed material together to form an intelligible pattern. It is admitted that the distribution of cloth in this area was controlled by the Government of Punjab (in undivided India) at all material times. It is also admitted that the plaintiffs were, what were called, "Government nominees" for Lyallpur. In the plaint the plaintiffs also called themselves the "reserve dealer". This term has not been explained but the use of these words, and the words "nominated importer", indicates that the plaintiffs occupied a privileged position. The letters (Exs. P-5 to P-12), on which the plaintiffs relied very strongly, also point to that; Ex. P-5, for example, shows that the defendant was obliged to give 10 bales out of a quota of 28 for that area to the plaintiffs under the orders of the Punjab Government and could only keep 18 for its own retail stores in the month of January, 1946. In April, the defendant was allowed to keep all 28 but in July, the distribution was 35:25 in the plaintiffs' favour. In September, November 1946 and April, 1947, 1947, it was half and half. In February and March, 1947, it was 10:26 and 29:26 for the plaintiffs and the defendant's stores respectively.

Now, ordinarily, a privilege has to be paid for and it seems that the price of this privilege was (1) payment of a security deposit of Rs. 1,000 and (2) payment of a second deposit against which cloth was issued from time to time in much the same way as a banker hands out money to a customer against deposits of money in a current account, only here the payments were issues of cloth instead of sums of money. We draw this inference from what we have said above and from the following facts:

(1) Both sides have called the payment a "deposit" in their pleadings;

(2) The plaintiffs speak of receiving goods "against this deposit" (paragraph 3 of the plaint) and Mohd. Bashir Khan (D.W. 1) of delivery being made "against this advance";

(3) The plaintiff Sardari Lal (P.W. 3) says that the parties have been carrying on dealings for 3 or 4 years and that "advances used to be made to the mills from time to time. Sometimes our balance stood at credit";

(4) Sardari Lal says that when their balance was on the debit side, they paid the defendant's interest but the defendant paid no interest when the balance was in the plaintiffs' favour. (This is the position when there is an overdraft in a bank);

(5) There was a balance of Rs. 79-6-6 standing in the plaintiffs' favour when the deposit of Rs. 55,000 was made;

(6) The plaintiffs said in their letter (Ex. P.W. 4|1) to the defendant that they had a "current account" with the defendant in which a sum of Rs. 11,496-6-6 was in "reserve account". This figure of Rs. 11,496-6-6 is made up by including the old balance of Rs. 79-6-6 in this account;

(7) In their letter Ex. P-14 the plaintiffs said that they had "deposited" money in the plaintiffs' account at Lyallpur "as reserve dealers", *against that* they received goods leaving a balance of Rs. 11,496-6-6. Again, this figure includes Rs. 79-6-6.

All this shows that the payment of Rs. 55,000 was not just an advance payment for a specified quantity of goods but was a running account very like a customer's current account in a bank. The only matter that can be said to indicate the contrary is the fact that the defendant has listed this money in Ex. D-11 under the head "Purchaser's advance." But the *mere* use of this term cannot alter the substance of the transaction any more than the *mere* use of the word "deposit". The fact that the parties choose to call it this or that is, of course, relevant but it is not conclusive, and in order to determine the true nature of a transaction it is necessary to view it as a whole and to consider other factors. But in this case we need not speculate because the plaintiffs have themselves explained the sense in which the term "Purchasers advance account" is used. In their statement of the case which they filed here, they say—

"The defendants maintained a 'Purchasers advance account' in their books at Delhi. The plaintiffs used to pay the defendants advance amounts *against which cloth was supplied and the balance had to be adjusted periodically.*"

But the banking analogy must not be pushed too far. The stress laid by the parties on the terms "Government nominees", "nominated importer" and "reserve dealer", both in the correspondence and in the pleadings and evidence, suggests that the defendant was dealing with the plaintiffs in their capacity of "Government nominees" and that, in its turn, imports the condition that the dealings would stop the moment the plaintiffs ceased to occupy that privileged position. As we have seen, the import of cloth was controlled by the Punjab Government at all relevant times with the result that the defendant could not sell to anybody it pleased. The sales had to be to the Government nominees. Therefore, if Government withdrew their recognition, the defendant would not have been able to sell to the plaintiffs any longer and it is fair to assume that the parties did not contemplate a continuance of their relationship in such an eventuality. But, as this was not a definite contract for the supply of a given quantity of goods which were to be delivered in instalments but a course of dealings with a running account, it is also reasonable to infer that the parties were at liberty to put an end to their business relationship at any time they pleased by giving due notice to the other side and in that event whichever side owed money to the other would have to pay. But, either way, the place of performance would, in these circumstances, be Lyallpur. We say this because all the known factors were situate in Lyallpur. The plaintiffs were the Government nominees for Lyallpur and they were resident there. The defendant carried on business there and the goods had to be delivered at Lyallpur and could not be delivered elsewhere, and so performance was to be there. The accounts were kept at Lyallpur, and though copies appear to have been forwarded to Delhi from time to time, the books were situate there and the Lyallpur office would be the only place to know the up-to-the minute state of the accounts. In the circumstances, it is reasonable to assume, as in the case of banking and insurance (matters we shall deal with presently), that on the termination of the contract the balance was to be paid at Lyallpur and not elsewhere. That localises the place of primary obligation.

This also, in our opinion, imports another factor. The defendant in Delhi would not necessarily know of any change of recognition by the Lyallpur authorities. The correspondence with the Collector indicates that the Government nominee cleared the goods from the defendant's Lyallpur godowns under the orders of the District Magistrate. If, therefore, the nominee was suddenly changed, intimation of this fact would have to be given to the defendant at Lyallpur and not at Delhi, otherwise there would be a time lag in which the defendant's Lyallpur office might easily deliver the goods to the plaintiffs as usual despite withdrawal of the recognition. Everything therefore points to the fact that the notice of termination would have to be given at Lyallpur and the obligation to return the balance would not arise until this notice of termination was received. That obligation would therefore necessarily arise at Lyallpur.

The plaintiffs' learned counsel argued very strongly that the defendant's Lyallpur business was carried on from Delhi and that the accounts were kept there, that there was no branch office at Lyallpur and that Lyallpur had no independent local control of the business. He relied on the letters written by the defendant to the District Magistrate, Lyallpur, about the allotments of quotas (Exs. P-5 to P-12) and also on Ex. D-7, a letter written by the defendant's General Manager at Lyallpur to the Deputy Custodian of Evacuee Property at Lyallpur in which he says that a

"complete list showing the list of all non-Muslims falling under item (3) with the amount to be paid has been asked for from our Head Office and will be submitted as soon as received"

Counsel contended that the Lyallpur people had so little to do with the accounts that they were not able to supply even a list of the persons who dealt with them. They had to find that out from Delhi.

These matters should have been put to the defendant's witnesses. Ex. D-7 was written in reply to a letter from the Deputy Custodian of Evacuee Property. That letter is Ex. D-6 and in it the Deputy Custodian refers to some earlier correspondence with the Under Secretary to the West Punjab Government, *Lahore,* which has not been filed. When we turn to the list that was eventually supplied from Delhi (Ex. D-11) we find that it relates to accounts from all over Pakistan such as, Multan, Peshawar, Lahore, Sialkot, Rawalpindi and even Karachi and Sukkar. Obviously, a local office like the Lyallpur office would not be in a position to supply that sort of information. The defendant's accountant at Lyallpur, Sewa Ram (P.W. 4), says that—

"Purchasers' deposits at Lyallpur were not recorded in the books of the defendant at Delhi but statements used to be despatched from there to Delhi. An account book was prepared from statement received from Lyallpur. That book is known as 'Reference Book'."

Presumably, that would also be the practice of the other branch offices, so the head office would be the only place from where a general overall picture (which appears to be what was asked for) could be obtained.

Now, the plaintiffs resided at Lyallpur at all relevant times and the defendant carried on business there through a local General Manager. We do not know where the contract was made but we do know that the plaintiffs contracted in a special capacity that was localised at Lyallpur, namely as the Government nominees for Lyallpur. We know that the goods were to be delivered at Lyallpur and could not be delivered anywhere else. We know that there was a running account and that that account was kept at Lyallpur, and we have held that the "debt" did not become due till the defendant was given notice at Lyallpur that the business relationship between the parties had terminated. The termination came about because of acts that arose at Lyallpur, namely the assignment of Lyallpur to the newly created State of Pakistan and the flight of the plaintiffs from Lyallpur which made further performance of the primary contract impossible. The only factors that do not concern Lyallpur are the defendant's residence in India and

the demands for payment made in Delhi. The fact of demand is not material because the obligation to pay arose at the date of termination and arose at Lyallpur, but if a demand for payment is essential, then it would, along the lines of the banking and insurance cases to which we shall refer later, have to be made at Lyallpur and a demand made elsewhere would be ineffective. On these facts we hold that the elements of this contract, that is to say, the contract out of which the obligation to pay arose, were most densely grouped at Lyallpur and that that was its natural seat and the place with which the transaction had its closest and most real connection. It follows from this that the "proper law of the contract", in so far as that is material, was the Lyallpur law.

We have next to see when notice to close the account and a demand for return of the balance was made and where. The plaintiff Jagat Singh (P.W. 5) says that he made a written demand in October, 1947. But the earliest demand we have on record is Ex. P.W. 4|4, dated 3rd January, 1949. It is understandable that the plaintiffs, who had to flee for their lives, would have no copies of their correspondence, but it is a matter for comment that the demand which is filed (Ex. P.W. 4|4) does not refer to an earlier demand or demands. The defendant was asked to produce all the correspondence because the plaintiffs had lost their own files. The defendant produced all we have on record and no suggestion was made that anything had been suppressed. Consequently we are not prepared to accept the plaintiff's statement and we hold that there was no demand before 3rd January, 1949.

Another point is that the earlier demand, even if made, could not have been made at Lyallpur. The plaintiff Jagat Singh says he made the demand to the defendant's Managing Director. He resides in Delhi and the plaintiffs had by then fled from Pakistan. Therefore, the demand could not have been made at Lyallpur, and apart from those demands, there is no other notice of termination, so, technically, the defendant would have been justified in declining to pay on the strength of a demand made in Delhi. The same defect attaches to Ex. P.W. 4|4. However, we are fortunately absolved from the need to base on so technical a ground.

Now at the date of the demand the Pakistan Ordinance (Ex. D-26) was in force and under it the defendant was prohibited from paying the money to the plaintiffs who were evacuees according to Pakistan Laws. The defendant was directed, instead, to deposit the money with the Deputy Custodian of Evacuee Property. This was done on 15th November, 1951 (Ex. D-12) and the deposit was made along with other similar deposits.

We now have to determine the legal liabilities which arise out of these facts. This raises complex questions of private international law, and two distinct lines of thought emerge. One is that applied by the English Courts, namely, the *lex situs;* the other is the one favoured by Cheshire in his book on Private International Law, namely, the "proper law of the contract".

The English approach is to treat the debt as property and determine its *situs* and then, in general, to apply the law that obtains there at the date when payment is due. But the difficulty of the English view is that they have different sets of rules for ascertaining the *situs*, with the result that the *situs* shifts from place to place for different purposes, also that it is determined by intention. Thus, it can be in one place for purposes of jurisdiction and in others for those of banking, insurance, death duties and probate. The *situs* also varies in the cases of simple contract debts and those of speciality.

That a debt is property is, we think, clear. It is a chose in action and is heritable and assignable and it is treated as property in India under the Transfer of Property Act which calls it an "actionable claim": sections 3 and 130. But to give it position in space is not easy because it is intangible and so cannot have

location except notionally and in order to give it notional position rules have to be framed along arbitrary lines.

Cheshire points out in his book on Private International Law, 4th edition, pages 449 to 451 that the *situs* rule is not logical and leads to practical difficulties when there is a succession of assignments because it is not possible to fix the situation of a debt under the *situs* rule in one place and only one place. Speaking of that Cheshire, quoting Foote, where Foote says that the assignment of a chose in action arising out of a contract is governed by the "proper law of the contract" paraphrases Foote thus at page 450—

> "If we understand him correctly, the appropriate law is not the 'proper law' (using that expression in its contractual sense) of the assignment, but the proper law *of the original transaction* out of which the chose in action arose. It is reasonable and logical to refer most questions relating to a debt *to the transaction in which it has its source and to the legal system which governs that transaction*......One undeniable merit of this is that, where there have been assignments in different countries, no confusion can arise from a conflict of laws, since all questions are referred to a single legal system."

The expression the "proper law of the contract" has been carefully analysed by Cheshire in Chapter VIII of his book. In *Mount Albert Borough Council* v. *Australasian Temperance and General Mutual Life Assurance Society*,[1] Lord Wright defined at page 240 as

> "that law which the English or other Court is to apply in determining the *obligations* under the contract,"

that is to say, obligation as contrasted with performance. Lord Wright drew the distinction between obligation and performance at page 240. In a later case, Lord Simonds described it as

> "the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connexion." *Bonython* v. *Commonwealth of Australia*[2].

Cheshire sets out the definition given by some American Courts at page 203 and adopts it:

> "It is submitted that, at any rate with regard to the question of valid creation, the proper law is the law of the country in which the contract is localized. Its localization will be indicated by what may be called the grouping of its elements as reflected in its formation and in its terms. The country in which its elements are most densely grouped will represent its natural seat......the country with which the contract is in fact most substantially associated and in which lies its natural seat or centre of gravity."

This involves two considerations. The first is whether the proper law is to be ascertained objectively or whether parties are free to fix it subjectively by ranging over the world and picking out whatever laws they like from any part of the globe and agreeing that those laws shall govern their contract. Cheshire points out at page 202 that "the subjective theory may produce strangely unrealistic results." It is also obvious that difficulties will arise if the contract is illegal or against public policy according to the laws of the country in which it is sought to be enforced though lawful according to the laws of the country which the parties choose: *see* Lord Wright in *Mount Albert Borough Council* v. *Australasian Temperance, etc., Society*,[1] at page 240, Cheshire prefers the view of an American Judge which he quotes at page 203—

> "Some law must impose the obligation, and the parties have nothing whatsoever to do with that, no more than with whether their acts are torts or crimes."

The contract we are considering is silent about these matters. There is no express provision either about the law that is to obtain or about the *situs*. We have therefore to examine the rules that obtain when that is the case.

The most usual way of expressing the law in that class of case is to say that an intention must be implied or imputed. In the *Bank of Travancore* v. *Dhrit Ram*,[3] Lord Atkin said that when no intention is expressed in the contract the Courts are left to infer one by reference to considerations where the contract was

1. L.R. (1938) A.C. 224.
2. L.R. (1951) A.C. 201 at 219.
3. (1942) 2 M.L.J. 256 : (1941) L.R. 69 I.A. 1 at 8 (P.C.)

made and how and where it was to be performed and by the nature of the business or transaction to which it refers. In the *Mount Albert Borough Council case*,[1] Lord Wright put it this way at page 240—

"The parties may not have thought of the matter at all. Then the Court has to impute an intention, or to determine for the parties what is the proper law which, as just and reasonable persons, they ought or would have intended if they had thought about the question when they made the contract."

But, to us, it seems unnecessarily artificial to impute an intention when we know there was none, especially in a type of case where the parties would never have contracted at all if they had contemplated the possibility of events turning out as they did. In our opinion, what the Courts really do, when there is no express provision, is to apply an objective test, though they appear to regard the intention subjectively, and that is also Cheshire's conclusion at page 201, where, after reviewing the English decisions, he says—

"In other words, the truth say be that the judges, though emphasising in unrestricted terms the omnipotence of intention, in fact do nothing more than impute to the parties an intention to submit their contract to the law of the country with which factually it is most closely connected."

If driven to a choice, we would prefer this way of stating the law but we need not decide this because, so far as the present case is concerned, the result is the same whether we apply the proper law of the contract or the English rules about the *lex situs*. It may be that in some future case this Court will have to choose between these two views but the question bristles with difficulties and it is not necessary for us to make the choice here. All we wish to do here is to indicate that we have considered both and have envisaged cases where perhaps a choice will have to be made.

We gather that English judges fall back on the *lex situs* and make rules for determining the position of a debt for historical reasons. Atkin, L.J., said in *New York Life Insurance Company* v. *Public Trustee*,[2] that the rules laid down in England are derived from the practice of ecclesiastical authorities in granting administration because their jurisdiction was limited territorially:

"The ordinary had only a jurisdiction within a particular territory. and the question whether he should issue letters of administration depended upon whether or not assets were to be found within his jurisdiction, and the test in respect of simple contracts was : where was the debtor residing?.... the reason why the residence of the debtor was adopted as that which determined where the debt was situate was because it was in that place where the debtor was that the creditor could, in fact, enforce payment of the debt."

(*See also* Dicey's Conflict of Laws, 6th edition, page 303). The rules, therefore, appear to have been arbitrarily selected for practical purposes and because they were found to be convenient.

But despite that the English Courts have never treated them as rigid. They have only regarded them as *prima facie* presumptions in the absence of anything express in the contract itself: *see* Lord Wright's speech in *Mount Albert Borough Council case*,[2] at page 240. Also, many exceptions have been engrafted to meet modern conditions. Atkin, L.J., draws attention to one in *New York Life Insurance Company* v. *Public Trustee*,[2] at page 120, where he says—

"therefore, cases do arise where a debt may be enforced in one jurisdiction, and the debtor being an ordinary living person, resides elsewhere."

So also Lord Wright in *Mount Albert Borough Council case*,[2] at page 240—

"It is true that, when stating this general rule, there are qualifications to be borne in mind, as for instance, that the law of the place of performance will *prima facie* govern the incidents or mode of performance, that is, performance as contrasted with obligation."

and at page 241, he says—

"Again, different considerations may arise in particular cases, as for instance, where the stipulated performance is illegal by the law of the place of performance."

And so also Lord Robson in *Rex* v. *Lovitt*,[3] at page 220—

1. L.R. (1938) A.C. 224.
2. L.R. (1924) 2 Ch. 101 at 119.
3. L.R. (1912) A.C. 212.

"It cannot mean that for all purposes the actual situation of the property of a deceased owner is to be ignored and regard had only to the testator's domicil for executors find themselves obliged in order to get the property at all to take out ancillary probate according to the locality where such property is properly recoverable, and no legal fiction as to its "following the owner" so as to be theoretically situate elsewhere will avail them".

And he says at page 221, that these rules are only "for certain limited purposes".

In banking transactions the following rules are now settled: (1) the obligation of a bank to pay the cheques of a customer rests *primarily* on the branch at which he keeps his account and the bank can rightly refuse to cash a cheque at any other branch: *Rex* v. *Lovitt*,[1] at 219, *Bank of Travancore* v. *Dhrit Ram*,[2] and *New York Life Insurance Company* v. *Public Trustee*,[3] at page 117; (2) a customer must make a demand for payment at the branch where his current account is kept before he has a cause of action against the bank: *Joachimson* v. *Swiss Bank Corporation*[4] quoted with approval by Lord Reid in *Arab Bank, Ltd.* v. *Barclays Bank*.[5] The rule is the same whether the account is a current account or whether it is a case of deposit. The last two cases refer to a current account; the Privy Council case (*Bank of Travancore* v. *Dhrit Ram*)[2] was a case of deposit. Either way, there must be a demand by the customer at the branch where the current account is kept, or where the deposit is made and kept, before the bank need pay, and for these reasons the English Courts hold that the *situs* of the debt is at the place where the current account is kept and where the demand must be made.

This class of case forms an exception to the rule that a debtor must seek his creditor because, though that is the general rule, there is nothing to prevent the parties from agreeing, if they wish, that that shall not be the duty of the debtor and, as Lord Reid explains in the *Arab Bank case*,[5] at page 531, a contract of current account necessarily implies an agreement that that shall not be the bank's duty, otherwise the whole object of the contract would be frustrated.

We have stressed the word "primarily" because the rules we have set out relate to the *primary* obligation. If the bank wrongly refuses to pay when a demand is made at the proper place and time, then it could be sued at its head office as well as its branch office and, possibly, wherever it could be found, though we do not decide that. But the reason is that the action is then, not on the debt, but on the breach of the contract to pay at the place specified in the agreement: see Warrington, L.J., at page 116 and Atkin, L.J., at page 121 of *New York Life Insurance Co.* v. *Public Trustee*.[3]

Now the rules set out above are not confined to the business of banking. They are of wider application and have also been applied in insurance cases: *Fouad Bishara Jabbour* v. *State of Israel*[6] and *New York Life Insurance Co.* v. *Public Trustee*.[3]

Similar considerations obtain in England when an involuntary assignment of a debt is effected by garnishment. Cheshire has collected a list of English cases at pages 460 to 463 of his Private International Law from which we have quoted above. He sums up the position at page 461 thus—

"It is difficult to state the rule with exactitude but it is propably true to say that a debt is properly garnishable in the country where, according to the ordinary usages of business, it would normally be regarded as payable."

But when all is said and done, we find that in every one of these cases the proper law of the contract was applied, that is to say, the law of the country in which its elements were most densely grouped and with which factually the

1. L.R. (1912) A.C. 212.
2. (1942) 2 M.L.J. 256: (1941) L.R. 69 I.A. 1 at 8 and 9 (P.C.).
3. L.R. (1924) 2 Ch. 101.
4. L.R. [1921] 3 K.B. 110.
5. L.R. (1954) A.C. 495 at 531.
6. [1954] 1 A.E.R. 145.

contract was most closely connected. It is true the judges purport to apply the *lex situs* but in determining the *situs* they apply rules (and modify them where necessary to suit changing modern conditions) which in fact are the very rules which in practice would be used to determine the proper law of the contract. The English Judges say that when the intention is not express one must be inferred and the rules they have made come to this: that as reasonable men they must be taken to have intended that the proper law of the contract should obtain. The other view is that the intention does not govern even when express and that the proper law must be applied objectively. But either way, the result is the same when there is no express term. The "proper law" is in fact applied and for present purposes it does not matter whether that is done for the reasons given by Cheshire or because the fluid English rules that centre round the *lex situs* lead to the same conclusion in this class of case.

That, however, raises a further question. Which is the proper law? the law that obtains when the contract was made and the obligation fashioned or the law in force at the time when performance is due? Here again, we think the answer is correctly given by Cheshire at page 210, quoting *Wolff's* Private International Law, page 424, and *Re. Chesterman's Trusts*:[1]

"A proper law intended as a whole to govern a contract is administered as 'a living and changing body of law' and effect is given to any changes occurring in it before performance falls due".

This is what the English Courts did in *New York Insurance Co.* v. *Public Trustee,*[2] *Re. Banque Des Marchands De Moscou,*[3] *Fouad Bishara Jabbour* v. *State of Israel,*[4] and *Arab Bank, Ltd.* v. *Barclays Bank.*[5] They were all cases in which the law changed because of the outbreak of war and where performance became impossible because of local legislation. In the last two cases, the debts vested in the Custodian because of local legislation and payment by the debtor to the Custodian was regarded as a good discharge of the debt. The position in those two cases was just what it is here.

Council argued that as Lyallpur was part of India, when the contract was made, the Indian law must be applied and that no different intention can be imputed to the parties. But that is not the law, as we understand it, whether we apply the "proper law" or the *situs* rules. The proper law will be the law at Lyallpur applied as a living and changing.whole, and this would have been the case even if India had not been divided, because each State had the right to make different local laws even in undivided India, as witness the different money lending laws and the cloth and grain control orders: indeed this very case is an illustration of that, for the controls which gave rise to this very contract were not uniform throughout India. But even apart from the "proper law" the decision of the Privy Council in *Arab Bank, Ltd.* v. *Barclays Bank,*[5] and of the Queens Bench Division in *Fouad Bishara Jabbour* v. *State of Israel*[4] negatives this contention when an intention has to be imputed or a clause in the contract implied.

It is necessary, however, to bear in mind that, under modern conditions, choses in action arising out of contract have two aspects: (1) as property and (2) as involving a contractual obligation for performance. The property aspect is relevant for purposes of assignment, administration, taxation and the like; the contractual aspect for performance. In the present case, we are primarily concerned with the property aspect because the Pakistan Ordinance regards debts as property and vests all evacuee property in the Custodian and requires every person holding such property to surrender it to the Custodian on pain of penalties prescribed by the Ordinance, and section 11 (2) states that—

1. L.R. [1923] 2 Ch. 466 at 478.
2. L.R. [1924] 2 Ch. 101.
3. [1954] 2 A.E.R. 746.
4. [1954] 1 A.E.R. 145.
5. L.R. [1954] A.C. 495, 529.

"Any person who makes a payment under sub-section (1) shall be discharged from further liability to pay to the extent of the payment made."

The payment was made and that, in our opinion, exonerated the defendant from further liability. Such payment would operate as a good discharge even under the English rules: see *Fouad Bishara Jabbour* v. *State of Israel,*[1] at page 154, where a number of English authorities are cited, including a decision of the Privy Council in *Odwin* v. *Forbes.*[2] That was also the result of the decisions in the following English cases, which are similar to this, though the basis of the decisions was the *situs* of the debt and the multiple residence of corporations: *Fouad Bishara Jabbour* v. *State of Israel;*[1] Re. *Banque Des Marchands De Moscou,*[3] and *Arab Bank, Ltd.* v. *Barclays Bank.*[4]

The same result follows from the decision of the Judicial Committee in the *Bank of Travancore, Ltd.* v. *Dhrit Ram,*[5] where Lord Atkin said—

"When consideration is being given to the question, what law did the parties intend to govern the contract? it seems proper to bear in mind that the promisor is a bank incorporated under Travancore law with, apparently, some connection with the State of Travancore, and governed as to its business by any law of Travancore that may affect banking......".

The only difference between that case and this is that at the date of the deposit in this case there was no difference between the laws of Punjab and Delhi on the present point. But they could have differed even if India had not been divided, as we have just pointed out. The English cases are, however, in point and we can see little in principle to distinguish them from this case.

The learned counsel for the plaintiffs-respondents argued that even if the law is what we have said, the Pakistan Ordinance does not apply to this case because "a cash deposit in a bank" is excluded. The argument was based on the definition of "property" in section 2 (5) of the Ordinance. But this is not a cash deposit in a bank as between the plaintiffs and the defendant. It is a debt which the defendant owes, or owed, to the plaintiffs, and the same definition states that "property" means, among other things, "any debt or actionable claim." The portion of the definition which speaks of a "cash deposit in a bank" means that such a deposit is not to be treated as "property" for the purposes of the Ordinance as between the bank and the customer who owns or controls the deposit. We hold, therefore, that whether the proper law of the contract applies or the English law of *situs* in a case of this kind, the defendant is exonerated because, the debt being "property", the Ordinance divested the plaintiffs of ownership in it and vested the debt in the Custodian and at the same time interfered with the obligation for performance by providing that payment to the Custodian shall operate as a discharge of the obligation.

But we wish to emphasize that we decide this because payment was in fact made to the Custodian and that we express no opinion about what would happen in a case where there is no payment and the defendant has no garnishable assets in Pakistan out of which the West Punjab Government could realise the debt by attachment of the defendant's property. Different conclusions might possibly arise in such a case.

Lastly, it was urged that the Pakistan Ordinance is a penal law and is confiscatory in character, therefore, no domestic tribunal will recognise it or give effect to it. That proposition is, in any event, too widely stated, but we are unable to condemn this law as opposed to the public policy of this country because we have exactly the same kind of laws here, as do other civilised countries which find themselves in similar predicament or at the outbreak of war; see *Arab Bank Ltd.* v.

1. (1954) 1 A.E.R. 145.
2. 1817 Buck. 57.
3. (1954) 2 A.E R. 746.
4. L.R. (1954) A.C. 495, 529.
5. (1942) 2 M.L.J. 256: (1941) L.R. 69 I.A. 1 at 9 (P.C.).

Barclays Bank,[1] and also *Fouad Bishara Jabbour* v. *State of Israel*,[2] and *Re. Munster*,[3] where a like argument was repelled. We hold that this legislation is not confiscatory.

The same rules apply to the item of Rs. 79-6-6 and to the deposit of Rs. 1,000 as security.

The appeal succeeds. The decrees of the lower Courts are set aside. A decree will now be passed dismissing the plaintiff's claim, but in the special circumstances of this case the parties will bear their own costs throughout.

Appeal allowed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—B. K. MUKHERJEA, *Chief Justice*, VIVIAN BOSE, B. JAGANNADHADAS, T. L. VENKATARAMA AYYAR AND SYED JAFER IMAM, JJ.

Bhikaji Keshao Joshi and another .. *Appellants**

v.

Brijlal Nandlal Biyani and others .. *Respondents.*

Representation of the People Act (XLIII of 1951), *sections* 80, 82 *and* 83—*Petition to set aside election—Order of election commission condoning delay in presenting beyond limitation—If can be re-opened by the election tribunal—Verification of petition—Essentials—Non-joinder of parties—Effect—Particulars given vague—Proper procedure.*

It is not open to the election tribunal to reconsider the question where the Election Commission has condoned the delay in presenting the election petition one day beyond the period of limitation prescribed by Rule 119 of the Rules framed under the Representation of the People Act, 1951.

Dinabandhu v. *Jadumoni* (1955), 1 S.C.R. 140 : (1954) S.C.J. 605, followed.

[*Queare:* Whether candidates whose nominations were in order but who withdrew from the contest within the time prescribed fall within the category of "candidates duly nominated at the election" in section 82 of the Act and are necessary parties to an election petition ?]

Even if any of the necessary parties other than the returned candidate has not been impleaded the petition is not liable to be dismissed *in limine* on that sole ground but it is a matter to be taken into consideration at the appropriate stage with reference to the final result of the case. *Jagan Nath* v. *Jaswant Singh*, (1954) S.C.R. 892 : (1954) S.C.J. 257 : (1954) 1 M.L.J. 480 (S.C.), followed.

Though there may be cases where the date of the pleading and the verification may be relevant and important, it would be a wrong exercise of discretionary power to dismiss an application on the sole ground of absence of date of verification. In such a case the applicants should normally be called upon to remove the lacuna by adding a supplementary verification indicating the date of the original verification and the reason for the original omission. Where the verification clauses refer to the entirety of the petition and the attached schedule, absence of enumeration of the various paragraphs therein as having been based on information cannot be considered to be a defect.

Section 83 (2) of the Representation of the People Act (1951) requires not only what may be reasonably considered "full particulars" having regard to the nature of each allegation, but enjoins in terms that the following particulars should also be given (1) Names of the parties alleged to have committed the corrupt practice,(2) the date of the commission of each such corrupt or illegal practice, (3) the place of commission of each such corrupt or illegal practice. The requirement of " full particulars" is one that has got to be complied with sufficient fullness and clarification so as to enable the opposite party fairly to meet them and they must be such as not to turn the enquiry before the Tribunal into a rambling and roving inquisition. Where the particulars are vague the Tribunal should call for better particulars and if it is not furnished strike out those items. An order dismissing the petition outright is clearly erroneous.

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1. L.R. (1954) A.C. 495.
2. [1954] 1 A.E.R. 145, 157.
3. L.R. [1920] 1 Ch. 268.

* C.A. No. 158 of 1954. 2nd May, 1955.

Appeal by Special Leave from the Judgment and Order, dated the 1st May, 1953, of the Election Tribunal, Akola, Madhya Pradesh, in Election Petition No. 1 of 1952.

Veda Vyas, Senior Advocate (*S. K. Kapur* and *Ganpat Rai,* Advocates, with him), for Appellants.

M. C. Setalvad, Attorney-General for India (*M. N. Phade* and *Naunit Lal,* Advocates, with him), for Respondent No. 1.

The Judgment of the Court was delivered by

Jagannadhadas, J.—This is an appeal by special leave against the judgment and order of the Election Tribunal, Akola, Madhya Pradesh, dated the 1st May, 1953, dismissing the election petition filed by the appellants. It relates to the election for the Akola Constituency of the State Assembly of Madhya Pradesh which was held on the 13th December, 1951, and the result of which was notified in the Gazette on the 4th April, 1952. The two appellants are the electors of the said Constituency. The first respondent was the successful candidate at the election. Respondents Nos. 2, 3 and 4 were the other three candidates who, having been validly nominated went to the polls but were defeated. The appellants filed the election petition under section 80 of the Representation of the People Act, 1951 (Act XLIII of 1951) (hereinafter referred to as the Act) for setting aside the election on various allegations. The petition was filed on the 19th April, 1952, before the Election Commission at Delhi and was admittedly one day beyond the prescribed time. The Election Commission admitted the petition after condoning the delay under the proviso to section 85 of the Act and thereupon constituted a Tribunal for the trial of the petition at Akola by notifications dated the 30th July, 1952 and 22nd September, 1952. In due course respondent No. 1 appeared and filed his written statement on the 6th October, 1952, and the petitioners filed their reply thereto on the 16th October, 1952. With reference to these pleadings, the Tribunal was of the opinion that it was advisable to frame certain preliminary issues and to dispose of the same before entering on the trial of the case on its merits. Accordingly, nine preliminary issues were framed. These nine issues substantially cover the following questions: (1) Whether the election petition was presented by a properly authorised person. (2) Whether there was sufficient cause for presentation of the petition one day out of time. (3) Whether the petition was defective for non-joinder of certain parties as respondents. (4) Whether the petition is defective for want of proper verification. (5) Whether the petition was defective for vagueness of the particulars relating to the corrupt practices set out in Schedule A thereto. The Tribunal found only the first of the above points in favour of the petitioners by a majority. But in respect of the other four points, it held against the petitioners unanimously. As a result of the adverse findings on these four points, the petition was dismissed without any trial on the merits. It is against this dismissal that the appellants have now come up to this Court on obtaining special leave.

Before dealing with the merits of the appeal, it may be mentioned that at an early stage of these proceedings before the Tribunal, an objection was taken to the composition of the Tribunal on the allegation that one of the Members, Shri A.S. Athalye was not competent to be a Member thereof on account of his alleged bias in favour of the first respondent. The bias was sought to be made out by showing that shortly before the election, Shri Athalye had written a letter to the 1st respondent offering to assist him in his election campaign. On objection being taken, the Tribunal stayed its hands for a preliminary decision of that question. Meanwhile, the petitioners took

proceedings in the High Court for the quashing of the constitution of the Tribunal on the above ground by means of an application under Article 226 of the Constitution. That application was dismissed after hearing both sides. Thereupon the petitioners moved this Court for special leave against the order of the High Court. But this Court declined to grant leave. Learned counsel for the appellants attempted to attack the validity of the decision of the Tribunal now under appeal on the same ground. But this having been already determined against the petitioners in the previous proceedings, we declined to allow the matter to be reopened. On the other side, the learned Attorney-General for the 1st respondent attempted to reopen before us the question as to whether the petition was presented to the Election Commission by an authorised person, which as stated above, was found against him by a majority of the Tribunal. The ground on which he attempted to reopen this question was that the finding was based on a wrong view as to the burden of proof. We were not prepared, however, to permit this finding of fact to be reopened in this appeal on special leave, irrespective of the question whether the burden of proof was rightly laid on the petitioners.

The only points, therefore, that have been argued before us are whether the view taken by the Tribunal with reference to the following questions, *viz.*, (1) limitation, (2) joinder of parties, (3) verification, and (4) specification of particulars of corrupt practices in Schedule A attached to the petition, is correct, and if so, whether the same entailed dismissal of the petition. The questions may be taken up one after the other.

LIMITATION: As stated above, the petition was filed on the 19th April, 1952, admittedly one day beyond time. On the 28th April, 1952, the petitioners filed also an application for condonation of delay setting out the reasons for the same. In paragraphs 3, 4 and 5 thereof the circumstances under which the delay is said to have occurred were set out as follows:

"3. The applicants were under the belief that Notice under rule 113 of the Rules framed under the above Act was published on 5th April, 1952, in the Official Gazette of the State of Madhya Pradesh. They felt therefore that their petition was duly presented within 14 days as prescribed by rule 119. Applicants, however, learn that actually the Notice under rule 113 was published in the Official Gazette of 4th April, 1952. It therefore appears that there was a delay of one day in the representation of the election petition. This delay occurred under the following circumstances :—

4. The applicants prepared their election petition on the 17th April, 1952. They sent the said petition with Shri P.B. Gole, Senior Advocate, Akola, with a written authority to present the petition through any person of his choice at Nagpur on the 18th April. They also sent with Shri Gole Rs. 1,000 for being deposited in the Government Treasury at Nagpur as required by section 117 of the Act and to obtain Treasury receipt for security of costs to be filed with the petition. The applicants were under the belief that an officer must have been appointed by the Election Commission under section 81 of the Act to whom election petitions could be represented for the State of Madhya Pradesh at Nagpur. Accordingly Shri Gole left Akola for Nagpur by the 1 Down Nagpur Mail, reaching Nagpur at about 9-30 A.M. on 18th April, 1952.

5. Mr. Gole caused the deposit of Rs. 1,000 security for costs to be made in the Government Treasury at Nagpur through Mr. Sidhaye, Advocate, Nagpur' and obtained the necessary Government Treasury receipt on the 18th April, 1952. He then made enquiries about the officer who may have been appointed to receive the election petitions. He consulted R.S. Rangole, who was attached to the Election Office at Nagpur. On enquiries Shri Gole learnt that there was none at Nagpur, who was authorised to receive election petition under the Act. Under these circumstances Shri Gole booked a seat in the Night Plane for Delhi and flew to Delhi on the 18th and reached there on the morning on 19th April, 1952. On 19th April Shri Gole caused the petition to be presented to the Secretary to the Election Commission".

The explanation thus furnished was accepted by the Election Commission as appears from the intimation to the petitioners by letter dated the 30th July, 1952. The Tribunal was of the opinion that notwithstanding the order of the

Election Commission condoning the delay and admitting the petition, it was free to reconsider the question by virtue of the powers vested in it under section 90 (4) of the Act. In this view it went into the merits of the explanation furnished and came to the conclusion that the petitioners were negligent and that the delay, even of one day, could not be condoned. It accordingly held that the petition was liable to be dismissed as barred by time. Now, apart from the merits of the sufficiency of the cause for delay, the question as to whether, notwithstanding the condonation of the delay by the Election Commission, it was open to a Tribunal to reconsider the matter by virtue of section 90 (4) of the Act, is now covered by the decision of this Court reported in *Dinabandhu* v. *Jadumoni*.[1] It was therein held that it was not open to the Tribunal to reconsider the matter in such a case. The conclusion of the Tribunal, therefore, on this point cannot be maintained. The learned Attorney-General attempted to argue that the decision of this Court referred to above was obiter as regards the legal point and required further consideration. But we were not prepared to permit that question to be reopened. We were also not satisfied that there was any adequate reason for the Tribunal to interfere with the view taken by the Election Commission condoning the delay of one day on the explanation furnished to it. This explanation has not been found, even by the Tribunal, to be false.

JOINDER OF PARTIES: The objection as to joinder of parties arises as follows. Three persons by name Shri Sohoni, Shri Kulkarni and Shri Kothkar were nominated as candidates at the election. Their nominations were found to be in order on scrutiny by the Returning Officer. But within the time allowed, these three withdrew from the elections under section 37 of the Act. The petitioners, while they impleaded as respondents the three unsuccessful candidates who went to the polls, did not implead these three persons. The view taken by the Tribunal was that these were also necessary parties and that their non-joinder rendered the petition liable for dismissal. In support of their view, the Tribunal relied upon section 82 of the Act which is as follows:

> "A petitioner shall join as respondents to his petition all the candidates who were duly nominated at the election other than himself if he was so nominated."

It has been argued before us that this view is erroneous and that persons who filed their nominations and who withdrew from the contest within the prescribed time in spite of their nominations having been found to be in order on scrutiny by the Returning Officer, cannot be said to fall within the category of "candidates duly nominated at the election". In support of this contention two decisions *Sitaram* v. *Yograjsing*,[2] and *Sheo Kumar* v. *V. G. Oak*,[3] have been cited. On the other side the case in *Mohammad Umair* v. *Ram Charan Singh*,[4] was brought to our notice in support of the view taken by the Tribunal. These three decisions have treated the decision of the question as depending on a construction of the phrase "at the election" in section 82 of the Act. The Bombay and Allahabad cases hold that this phrase confines the necessary parties under this section to those who were candidates for the actual poll, while the Patna High Court takes the view that the phrase "at the election" has no such limiting significance. It appears to us to be unnecessary and academic to go into this judicial controversy having regard to the decision of this Court in *Jagan Nath* v. *Jaswant Singh*.[5] If we were called upon to settle this controversy, we would prefer to base the decision not on any meticulous construction of the phrase "at the election" but on a

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1. (1955) 1 S.C.R. 140 : (1954) S.C.J. 605.
2. A.I.R. 1953 Bom. 293.
3. A.I.R. 1953 All. 633.
4. A.I.R. 1954 Patna 225.
5. (1954) 1 M.L.J. 480 : (1954) S.C.J. 257 : (1954) S.C.R. 892 (S.C.).

comprehensive consideration of the relevant provisions of the Act and of the rules framed thereunder and of the purpose, if any, of the requirement under section 82 as to the joinder of parties other than the returned candidate. We are, however, relieved from this, since it has been decided in *Jagan Nath* v. *Jaswant Singh*,[1] that even if any of the necessary parties other than the returned candidate has not been impleaded, the petition is not liable to be dismissed *in limine* on that sole ground but that it is a matter to be taken into consideration at the appropriate stage with reference to the final result of the case. In view of this ruling the decision of the Tribunal on this point also cannot be maintained.

VERIFICATION: The view taken by the Tribunal on this question is based on section 83 (1) of the Act which is as follows:

"An election petition shall contain a concise statement of the material facts on which the petitioner relies and shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908, for the verification of pleadings".

The relevant provision in the Civil Procedure Code referred to herein is Order 6, rule 15, clauses (2) and (3), which are as follows:

"(2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true.

(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed."

In the present case the verification of the petition as well as the schedule of particulars of corrupt practices are each signed by both the petitioners and there is now no dispute about it. The verification clause in the petition is as follows:

"The above-named applicants hereby affirm that the contents of the above petition are true to information received from the press reports and several other electors and believed by them to be true.

Signed and verified at Akola on ".

The verification clause relating to the particulars of corrupt practices in Schedule A is as follows:

"The above-named applicants affirm that the contents in this schedule are true to information received and believed by us to be true.

Signed and verified at Akola on ".

In the view of the Tribunal there were two defects in these verifications. They do not refer to any numbered paragraphs nor do they bear the dates on which they were signed. In the view of the Tribunal the petition was liable to dismissal for non-compliance with the specific provision in the Act in this behalf. That the verification neither in the petition nor in the schedule of particulars bears any date is not disputed. But it is contended that the view taken by the Tribunal in so far as it was of the opinion that the verifications do not refer to any numbered paragraphs is unsustainable. It is pointed out that the statements in the verification were clearly meant to convey that the various allegations in the petition and schedule were, in their entirety, based on information and belief. It is urged, therefore, that there was no scope and hence no need to specify which were based on personal knowledge and which upon information. We agree with this contention. It is to be noticed that a verified pleading is different from an affidavit which, by virtue of Order 19, rule 3, is specifically required to be confined to such facts as the deponent is able of his own knowledge to prove (except on interlocutory applications, on which statements of his belief may be admitted, provided that the grounds thereof are stated). But there is not—and in the nature of things

1. (1954) 1 M.L.J. 480 : (1954) S.C.J. 257 : (1954) S.C.R. 892 (S.C.).

there cannot be—any such limitation for pleadings. Hence it became necessary in the verification of a pleading to demarcate clearly between the two. The allegations in the petition in this case purport to be based only on information. Since the verification clauses refer to the entirety of the petition and the attached schedule, absence of enumeration of the various paragraphs therein as having been based on information cannot be considered to be a defect. The verifications are accordingly defective only as regards the requirement of the dates thereof. The question is whether the petition is liable to dismissal on this ground. Though there may be cases where the date of the pleading and the verification may be relevant and important, it would be a wrong exercise of discretionary power to dismiss an application on the sole ground of absence of date of verification. In such a case the applicants should normally be called upon to remove the lacuna by adding a supplementary verification indicating the date of the original verification and the reason for the earlier omission.

PARTICULARS OF CORRUPT PRACTICES: The objection is based on section 83 (2) of the Act which is as follows:—

"The petition shall be accompanied by a list signed and verified in like manner setting forth full particulars of any corrupt or illegal practice which the petitioner alleges, including as full a statement as possible as to the names of the parties alleged to have committed such corrupt or illegal practice and the date and place of the commission of each such practice".

The objection is that the particulars of the instances furnished in Schedule A to the petition are all of them vague and not in compliance with the above provision. The list of particulars is as follows:

"SCHEDULE 'A'.

List of particulars of instances referred in the accompanying petition.

1. That in the month of December, 1951, respondent No. 1 has been to the premises of Akola Shree Gurudwara, where the Local Sikh Community had assembled to listen to the recitation of the holy book "Granth Saheb" on the 7th day of the death of daughter of one Sardar Suratsingh. At this meeting respondent No. 1 canvassed for votes for himself and paid Rs. 201, apparently as donation to the Gurudwara, but really as gift for including the Sikh Community in the Akola Constituency in general and the Sikhs assembled in particular to induce them to vote for himself at the ensuing election. Respondent No. 1 was guilty of bribery within the meaning of that term in section 123 of the Representation of the People Act.

Similar instances of giving illegal gratifications for securing votes of respective groups are—

(*a*) Donation to Hariharpeth Akhada ;

(*b*) Payment to Panch-bunglow Committee of Bhangis of Old City.

(*c*) Donation to Bhaji Bazar Association.

(*d*) Distribution of blankets and saries and money to voters.

2. At the instance of respondent No. 1 a meeting of workers in Berar Oil Industries—a concern of Birla, was called by its manager on the eve of the election and they were threatened to vote for respondent No. 1 on pain of losing their service or suffer pecuniary loss, in case they did not vote for respondent No. 1. The poster of the rival candidate affixed on the post-office within the premises of the Berar Oil Industries was removed and stolen away.

3. Respondent No. 1 caused groups and sections of castes and communities, such as Bohras, Lohars, Marwaries, Muslims, Rajasthanies, Bhangies, to issue appeals stating that resolutions were passed for voting for respondent No. 1, coercing the voters by threats, etc., to vote for respondent No. 1 and openly canvassing on communal and caste lines and using undue influence.

4. Issuing pamphlets and handbills without names of printer or publisher.

5. At the time of counting votes in Polling Station No. 53, several folded bundles amounting to about 20 in number, of ballot papers were found in the ballot box of respondent No. 1, when it was opened for counting votes. This was noted by the Returning Officer. Each bundle consisted three or more than three ballot papers, folded together. Obviously each of the bundle of these ballot papers were put in the ballot box by one person, as the ballot papers put in the ballot box by different

voters could not automatically fold themselves into a compact bundle in the ballot box. The ballot papers issued to voters were not put in the box by the voter themselves, but were illegally brought back by the voters and handed over to persons working for and on behalf of respondent No. 1 on payment of illegal gratification. These ballot papers thus collected were bundled together and put in the ballot box by persons working for and on behalf of respondent No. 1 by taking illegal gratifications. This was done on 31st December, 1951, at Chandur by persons with the connivance of respondent No. 1.

6. False personation of several dead voters and voters absent in Pakistan has taken place in Ward Nos. 12 and 15.

7. The respondent No. 1 resorted to false propaganda. His man announced on loud speakers from place to place that rival candidate Dr. Joglekar was of the caste and party of Godse, the murderer of M. Gandhi and a vote for him was a vote for Gandhi's Murderer. Another false propaganda was that Dr. Joglekar was Mishra's man, supported by Mishra's money Lecturers for respondent No. 1 in public meetings, including respondent No. 1 have freely made these false defamatory and malicious statements against Dr. Joglekar, the rival candidate and thus prejudiced the prospects of Dr. Joglekar's election. Personal character and conduct of Dr. Joglekar was also falsely attacked, thus prejudicing his prospects of election.

8. Voters were carried in hired carts at many polling stations, particularly at Kapshi Polling Station. This was arranged by persons working for and on behalf of respondent No. 1 at his expense and connivance. A written objection for police enquiry was given at Kapshi and one in Rifle Range area.

9. Respondent No. 1 spent lacs of rupees over his election transgressing the prescribed limit of Rs. 6,000. He has given a totally untrue return of election expenses. This is in contravention of law.

10. Mohota Mills released workers and paid them for canvassing work for respondent No. 1 on polling day. Substitutes for these workers were engaged by the mills and they were also paid. This was done at the instance of respondent No. 1".

There can be no doubt that almost all the instances herein-above set out are extremely vague and lack sufficient particulars. Learned counsel for the appellants invited our attention to the fact that the Tribunal, while considering the questions of vagueness dealt only with the instances of corrupt practices specified in paragraphs 1 (a), 1 (b), 1 (c), 1 (d), 2, 4, 5, 6, 7 and 8 and not others. He accordingly contended that, by implication, the Tribunal was not prepared to hold that items mentioned in paragraphs 1, 3, 9 and 10 were vague. He urged that at least these four items must be taken not to be vague and that there is no reason why the petitioners should not have been called upon to amend the schedule by furnishing better particulars as to the rest. He further urged that, at any rate, they were entitled to a trial in respect of those four items of corrupt practices. We cannot agree with learned counsel for the appellants that the items set out in paragraphs 3, 9 and 10 are not vague. There is no specification therein of the requisite details which the Act in terms requires. Section 83 (2) requires not only what may reasonably be considered "full particulars" having regard to the nature of each allegation, but enjoins in terms that the following particulars should also be given. (1) Names of the parties alleged to have committed the corrupt or illegal practice. (2) The date of the commission of each such corrupt or illegal practice. (3) The place of commission of each such corrupt or illegal practice. There can be no reasonable doubt that the requirement of "full particulars" is one that has got to be complied with, with sufficient fullness and clarification so as to enable the opposite-party fairly to meet them and that they must be such as not to turn the enquiry before the Tribunal into a rambling and roving inquisition. On a careful scrutiny of the list in Schedule A we are satisfied that none of the items except that which is set out in paragraph 1 of item No. 1 can be said to comply with the requirements of section 83 (2). In this view of the

contents of Schedule A, the contention of the learned counsel for the appellants is that even so the Tribunal should have called upon the petitioners to furnish better particulars as regards all the other items, by virtue of the powers conferred on it under section 83 (3), and in the alternative, it should have at least called upon them to substantiate the allegation in paragraph 1 in item No. 1, which was sufficiently specific and which, if made out, might have resulted in the election being set aside. On the question whether or not the Tribunal should have called upon the pttitioners to amend the schedule by furnishing better particulars, the learned Attorney-General for the 1st respondent has invited our attention to the objection taken in the written-statement as regards the vagueness of the particulars and to the various orders made by the Tribunal as appears from the order-sheet of the case. In the written-statement of the 1st respondent paragraph 9 is as follows:

"9 (*a*) It is, further, submitted that the petition ought to be dismissed as it does not contain concise statement of material facts on which the petitioners rely. Similarly the list of particulars given in the schedule or in the petition are not compliance with section 83 (2).

(*b*) Without prejudice to the generality of this objection, it is further submitted that para. 5 of petition read with para. 6 (*e*) will show that the particulars given in schedule relate to corrupt and illegal practices alleged to have been committed by respondent No. 1 and by his agents and persons working on behalf of respondent No. 1 with his connivance. Such particulars are bad in law. The applicants are bound to state the names of the persons who are alleged to have actually committed the corrupt or illegal practice.

(*c*) Paras. 1 and 2 of the petition allege that there was no free election by reason of general bribery and undue influence exercised by and on behalf of respondent No. 1. Similarly the allegation in para. 2 is that the coercion was the result of manipulation by or at the instance of respondent No. 1. Thus these allegations must be supported by giving the necessary particulars regarding the names, date and place of commission of corrupt or illegal practice alleged. The allegations in paras. 1 and 2 of the petition are allegations of corrupt and illegal practice within the meaning of sections 123, 124 and 125 of the Act, and are not allegations of a general character which do not implicate the candidate personally.

(*d*) Further by way of example, para. 1 of the schedule, no names, date of the alleged practices are given. Same is the case which the allegations in paras. 2, 3, 4, 5, 6, 7, 8, 9 & 10.

(*e*) It is for the petitioners to satisfy the Election Commission and the Tribunal that the particulars given are according to law. This has not been done and the petition, therefore, ought to be dismissed on this ground".

Now the order-sheet of the proceedings before the Tribunal discloses the following. By order dated the 16th October, 1952, the Tribunal decided that the case was in the first instance to be taken up for decision on the preliminary issues. Having so decided it passed the following order:

"We call upon the parties whether they want to add by way of amendment to the pleadings on facts which they have already made, as in some of the preliminary points the question of fact is involved.

The respondents do not want to add to their pleadings on facts in respect of the above preliminary issues. The petitioners have made an application under Order 6, rule 16, Civil Procedure Code, for striking out some portion in paras. 3-b and para 4-d (2) of the written statement of the respondent No. 1."

On the 17th January, 1953, the Tribunal passed the following order:

"The respondent No. 1 prays for time to amend his written statement and to ask for particulars. In the interests of justice the time is granted......The application for amendment and for particulars to be filed five days before the date of hearing and copies thereof be given to the petitioners. The petitioners shall be ready with their replies on the date of hearing".

On the 27th January, 1953, the order is

"The petitioners have filed their reply to the amendment application of the respondent No. 1. The latter has amended his application, to which there was no objection".

On the 29th January, 1953, the order is

"The petitioners do not want to amend their pleadings in view of the amendment of the written statement."

In view of the specific objection taken in the written-statement and the opportunities which the petitioners had for amending the petition which the above orders disclose, there is considerable force in the contention of the leaned Attorney-General that the petitioners, for some reasons best known to themselves, have come forward with a somewhat irresponsible petition and that while the Court has undoubtedly the power to permit amendment of the schedule of corrupt practices by permitting the furnishing of better particulars as regards the items therein specified, there was no duty cast upon the Tribunal to direct *suo motu* the furnishing of better particulars. It is true that the petitioners in the reply that they filed to the written-statement of the 1st respondent and in answer to the objection that the particulars as to the alleged corrupt practices were vague, said as follows:

"The petitioners are prepared to give further particulars if the Tribunal is pleased to permit under section 83 (3) of the Representation of the People Act."

This reply was filed on the 16th October, 1952, which is the very date on which the first of the above orders extracted from the order-sheet was passed. It is also true that the order dated the 17th January, 1953, shows that the respondent No. 1 at one stage, indicated an intention himself to ask for particulars. But in a matter of this kind the primary responsibility for furnishing full particulars of the alleged corrupt practices and to file a petition in full compliance with section 83 (2) of the Act was on the petitioners. While undoubtedly the Tribunal has, in our opinion, taken all too narrow a view of their function in dealing with the various alleged defects in the petition and in treating them as sufficient for dismissal, the petitioners are not absolved from their duty to comply, of their own accord, with the requirements of section 83 (2) of the Act and to remove the defects when opportunity was available. They cannot take shelter behind the fact that neither the Tribunal nor the respondent No. 1 has, in terms, called upon them to furnish better particulars.

The position, therefore, on the question of compliance or otherwise of the requirements of section 83 of the Act is that (1) the verifications in the petition and schedule are defective inasmuch as the dates thereof are not specified, and (2) the schedule of particulars consists of a number of items of which only one at best could have been taken up for inquiry by the Tribunal. But all the rest were not only extremely vague but no amendment was applied for nor was an opportunity for amendment of pleadings in general, open on two occasions, availed of. Learned counsel for the appellants urges that however this may be, there was no justification for the Tribunal dismissing the petition *in toto* and that it was bound to have called upon the petitioners to substantiate the first allegation by evidence after striking out, if need be, the rest of the particulars, under the powers vested in it under Order 6, rule 16, Civil Procedure Code. On the other hand the learned Attorney-General for the respondent No. 1 urges that in such a situation it was open to the Tribunal to consider whether, taking the petition as a whole and in its total effect, there was substantial compliance with the requirements of section 83. He contends that if, in exercise of its judgment, it thought that there was substantial non-compliance, notwithstanding that one out of the various items may have been specific, it was not bound to exercise its discretion in favour of the petitioners by ordering a striking out of the various items and to direct the trial of the petition to be confined to

one single item which may be in order. The learned Attorney-General argues that this would be really making out for the petitioners a different petition from what they brought up before the Election Commission and that in this class of cases the Tribunal had the right and the duty to exercise great strictness in order that the machinery for setting aside elections might not be abused for the purpose of maligning the successful candidate by levelling vague and irresponsible charges against him. While there is considerable force in this argument, we think that in a case of this kind the Tribunal when dealing with the matter in the early stages should not have dismissed the application. It should have exercised its powers and called for better particulars. On non-compliance therewith, it should have ordered a striking out of such of the charges which remained vague and called upon the petitioners to substantiate the allegations in respect of those which were reasonably specific. We are, therefore, of the opinion that the order of the tribunal in dismissing the petition outright was clearly erroneous. Notwithstanding this opinion we would, in the normal course, not have felt called upon to interfere in this case under Article 136 after this lapse of time and at the instance of persons like the appellants before us who are mere voters having no direct personal interest in the result of the election.

But there is one other circumstance in this case which we have noticed and which we feel we ought not to overlook, though in the course of the arguments the same was not brought to our notice. Paragraphs 6 (a), (b) and (c) of the application for setting aside the election sets out certain grounds of alleged disqualification of the returned candidate to stand for the election. It is also stated therein that objections in this behalf were taken at the time of scrutiny of the nomination papers but that they were summarily overruled by the Returning Officer without any enquiry and that accordingly the objections to the disqualification have been raised in the application. The objections are as follows:

"6. The material facts in support of the grounds are as follows :—

(*a*) The election of candidate for the Madhya Pradesh State Assembly in the single member Akola Constituency was announced to be held on 31st December, 1951. Nominations were to be filed on or before 15th November, 1951 and scrutiny of nomination was due on 17th November, 1951. At this time of scrutiny objection was taken to the nomination paper of respondent No. 1 on several grounds but the material grounds were that respondent No. 1 was disqualified for being chosen as and for being a Member of Madhya Pradesh State Assembly under Chapter III, section 7 (*d*) of the Representation of the People Act, 1951 (Act XLIII of 1951). That the respondent No. 1 is disqualified to fill the seat under the Act, because he is the Managing Agent or Managing Director of Rajasthan Printing and Litho Works—private limited company under the Indian Companies Act. He has, as a share-holder and director, interest, in contracts for supply of goods, *viz.*, stationery, paper and printing materials, etc., to the State Government of Madhya Pradesh. He has also interest in contracts for the execution of works or performance of services, such as printing, etc., undertaken by the State Government of Madhya Pradesh. The respondent No. 1 gets a share by way of commission on sales effected by the Limited Company. He has, therefore, by himself interest in the contracts of the company with the State Government of Madhya Pradesh.

(*b*) The respondent No. 1 is a partner in the firm Berar General Agency. The said firm has entered into a contract for the performance of cloth distribution on behalf of the State Government to retailers and holds a licence for the same. The respondent No. 1, therefore, has interest by himself in the said contract for the performance of services undertaken by the Government.

(*c*) The respondent No. 1 is the proprietor of the monthly Journal "Prawaha" and a bi-weekly paper "Matrubhumi". These publications print Government advertisements on contract basis. The respondent No. 1 has, therefore, interest in the said contract for the performance of services undertaken by the State Government, Madhya Pradesh. The income derived from these contracts by the respondent No. 1 are noted in the private accounts of the respondent No. 1 and their details are

shown in the profit and loss statements filed with income-tax return of the respondent No. 1 for the relevant year and current year.

The sales and other details of the "Matrubhumi" concern are noted in the private account of the respondent No. 1.

These objections were summarily overruled by the Returning Officer, without any inquiry or any reason."

These allegations, if made out with such further details as may be necessary, might well prove serious and bring about the setting aside of the election of the returned candidate. The 1st respondent in answer to these allegations states as follows:

"It is denied that there was any improper acceptance of the nomination paper of respondent No. 1 and in particular it is denied that any of the allegations made in paragraph 6 (*a*), (*b*) & (*c*) of the petition constitute in law a disqualification of section 7 of the Representation of the People Act. With out prejudice to this it is submitted that the respondent No. 1 was not suffering from any of these disqualifications in fact on the date of the submission of the nomination paper."

Having regard to the nature of the alleged disqualification, which is substantially to the effect that the returned candidate had interest in contracts with the Government at the relevant dates, it was very necessary that the matters should have been cleared up in the enquiry before the Election Tribunal. It is not in the interest of purity of elections that such allegations of disqualification should be completely ignored without enquiry and it appears rather surprising that the Tribunal should have ignored them and exercised its power to dismiss the petition. However reluctant we might be to interfere in a matter like this after the lapse of three years and four months and with only an year and eight months before the general elections, we feel constrained to send this matter back for due enquiry. But before doing so and in view of the delay and other circumstances that have already happened, we, in exercise of the powers which the Tribunal in the normal course might itself have exercised, direct the striking out of all the items of alleged corrupt practices set out in Schedule A excepting the one covered by paragraph 1 of item 1, *i.e.*, as follows:

"That in the month of December, 1951, respondent No. 1 had been to the premises of Akola Shree Gurdwara, where the local Sikh community had assembled to listen to the recitation of the holy book 'Granth Saheb' on the 7th day of the death of daughter of one Sardar Suratsingh. At this meeting respondent No. 1 canvassed for votes for himself and paid Rs. 201, apparently as donation to the Gurdwara, but really as gift for inducing the Sikh community in the Akola Constituency in general and the Sikhs assembled in particular to induce them to vote for himself at the ensuing election. Respondent No. 1 was guilty of bribery within the meaning of that term in section 123 of the Representation of the People Act."

The case will, therefore, go back for enquiry and trial with reference only to (1) the allegations in paragraphs 6 (a), (b) and (c) of the application for setting aside the election, and (2) the allegations in paragraph 1 of item 1, in Schedule A attached to the application as set out above.

The Election Commissioner will now reconstitute an appropriate Tribunal for the purpose. The Tribunal when constituted and before proceeding to trial will call upon the petitioners to rectify the lacuna as to dates in the verification clauses in the petition and the schedule. It is to be hoped that the fresh proceedings before the Tribunal will be disposed of at a very early date. The appeal is allowed as stated above but, in the circumstances, without costs.

Appeal allowed and case sent back for trial.

SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT:—B. JAGANNADHADAS. (VACATION JUDGE.)

Thakur Prasad Bania and others .. *Petitioners**

v.

The State of Bihar and another .. *Respondents.*

Preventive Detention Act (IV of 1950)—Order for detention—Grounds for, arising on the same set of facts in respect of which criminal prosecutions and proceedings under section 107, Criminal Procedure Code (V of 1898), had already been initiated—Validity of detention order—Obligation to furnish grounds which are not vague.

It may be that where the grounds on which a detention order is based are also the subject-matter of a criminal prosecution, the order of detention may amount to an abuse of the statutory powers. But no case has laid down, so far, that such an order is necessarily *mala fide*. Courts have treated such a circumstance as calling for scrutiny as to the *bona fides* of the detention order but have held that the question of *mala fides* has got to be decided as one of fact with reference to all the circumstances of an individual case. In a proper case the question may have to be dealt with fully by the Supreme Court.

In the instant case, however, the grounds of detention were not wholly the same as the facts in respect of which prosecution was launched and the proceeding under Section 107 of the Criminal Procedure Code was initiated and in the circumstances the contention that the detention orders are in the nature of interference with the course of justice and therefore *mala fide* is not sustainable.

The obligation of the Government to furnish grounds which are not vague cannot be taken to mean that they must furnish every meticulous detail.

(Under Article 32 of the Constitution of India for a writ in the nature of *habeas corpus.*)

U. M. Trivedi, Senior Advocate (*Ganpat Rai,* Advocate, with him) for Petitioners.

Mahabir Prasad, Advocate-General for the State of Bihar (*S. P. Verma* Advocate, with him) for Respondents.

The Judgment of the Court was delivered by

Jagannadhadas, J.—These five are petitions by five individuals who are now under detention for the issue of a writ in the nature of *habeas corpus* in respect of each of them. The orders of detention in question were issued by the District Magistrate of Saran on the 17th October, 1954, and the Government passed further orders under section 3 of the Preventive Detention Act, 1950 (Act IV of 1950) on the 27th October, 1954, approving the detention orders passed by the District Magistrate. These orders were confirmed later by the Government, on the 5th January, 1955, presumably after the consideration thereof by the Advisory Board and the detention in respect of each was directed to be continued until the 17th October, 1955. The grounds of detention in all these cases arises out of the same set of facts and are more or less similar, if not the same. The validity of the detention in each of the cases is attacked on the same grounds and there has been only one single argument in respect of all these petitions. Hence they are dealt with by this common order.

One argument of a general nature relating to all these matters arises with reference to the facts set out in paragraphs 1 to 10 in each of these petitions,

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* Petitions Nos. 206 to 210 of 1955. 13th August, 1955.

the substance of which is as follows. In respect of an alleged disobedience of a prohibitory order banning processions in the town of Siwan on the 9th October, 1954, *i.e.,* the Dasara day, and for alleged rioting arising out of the said disobedience, there was launched on the 10th October, 1954, a criminal prosecution against these five petitioners and some others under sections 143, 145, 147 and 352 of the Indian Penal Code. On the 11th October, 1954, a proceeding under section 107 of the Criminal Procedure Code was also started against them in view of the alleged disturbances of the 9th October. While these two proceedings were in the initial stages the Government passed the preventive detention orders now under challenge with reference to the same facts as against the present five petitioners and thereafter withdrew the above two criminal proceedings only as against them, while proceeding with the same in respect of the others. The contention raised is that a detention order passed under these circumstances is an interference with the normal course of justice and is *ipso facto mala fide* and has got to be quashed on this very ground. Observations of this Court and of some of the High Courts in similar cases have been brought to my notice which suggest that where the grounds on which a detention order is based are also the subject-matter of a criminal prosecution, the order of detention may amount to abuse of the statutory powers. But no case has laid down, so far, that such an order is necessarily *mala fide*. Courts have treated such a circumstance as calling for scrutiny as to the *bona fides* of the detention order but have held that the question of *mala fides* has got to be decided as one of fact with reference to all the circumstances of an individual case. It is unnecessary, however, in these cases to base the decision on any such view. In a proper case that question may have to be dealt with fully by this Court. But here, as has been pointed out in the judgment of the High Court and in the counter-affidavit filed on behalf of the State, the grounds of detention are not wholly the same as the facts in respect of which the prosecution was launched and the proceeding under section 107 of the Criminal Procedure Code was initiated. There are at least four items in the grounds of detention which are not the subject-matter of the prosecution, for instance grounds Nos. 4, 5, 11 and 17. In these circumstances the contention that the detentions are in respect of the very same matters for which the prosecutions were launched and that the detention orders are in the nature of interference with the course of justice and therefore *mala fide* is not sustainable.

The next argument that has been urged before me is that ground No. 17 which is as follows is on the face of it unsupportable.

> "Due to the above enumerated actions of his, communal situation in Siwan town and also its neighbourhood namely, Benusar, Amlori, Pachrukhi, Harihans, Ratharua, Hathuari, Andor and Maharajganj deteriorated so much so that the communal situation became very explosive and serious communal conflagration resulting in widespread riots became imminent on the evening of 24-9-1954. This could only be averted with the great difficulties by the authorities and after a deployment of considerable armed, unarmed, and mounted police force in the town and the muffasil requisitioned from Chapra, Patna, Muzzafarpur and Arrah".

To appreciate this argument it is necessary to notice that grounds Nos. 1 to 16 refer to various instances dated the 19th September, 1954, 20th September, 1954, 22nd September, 1954, 24th September, 1954, 29th September, 1954, 6th October, 1954, 9th October, 1954 and 10th October, 1954. It is pointed out that the statement "Due to *the above enumerated* actions of his, the communal situation in Siwan town............deteriorated......resulting in wide spread riots became imminent on the evening of 24th September, 1954, which could only be averted with difficulty by deployment of considerable armed police" is patently erroneous since the incidents on and after 25th September, 1954, could not possibly have any bearing on the situation a day prior thereto, *viz.*, 24th September, 1954. It is said, therefore, that ground No. 17 is a totally irrelevant and unsustainable ground and

that this feature vitiates the entire order. Reliance is placed on *Dr. Ram Krishan Bhardwaj* v. *The State of Delhi.*[1] The language of ground No. 17 set out above certainly does give scope for this comment and argument, and it is extremely regrettable that in so important a matter as detention of a citizen without trial such mistakes are allowed to occur suggesting absence of careful scrutiny by the authority concerned. A perusal, however, of the various grounds and a reading of paragraph 17 in the light thereof would reasonably indicate that what is stated in paragraph 17 as being the situation by the evening of 24th September, 1954, is to be related to the actions enumerated in paragraphs 1 to 6 and not to those in paragraphs 7 to 16 and that the phrase "above enumerated" is not necessarily to be related to all the "above" but only to some out of them. At best it may be said that loose language has been used. Quite apart from this, however, paragraph 17 purports to do nothing more than to state a fact, *viz.* "that the communal situation became explosive and serious communal conflagration resulting in widespread riots became imminent by the evening of the 24th September, 1954.' This is a statement of fact on which, along with the facts in paragraphs 1 to 16, the decision of the Government to detain the petitioners is based. Even assuming that there is some mistake in the enumeration of what events lead to the communal situation, the truth or otherwise of the assertion that there was in fact a communal situation of an explosive nature by the evening of 24th September, 1954, is one that cannot be gone into in this Court. I do not see, therefore, how the case in *Dr. Ram Krishan Bhardwaj* v. *The State of Delhi,*[1] can be made to apply to the facts of this case.

The next argument is that some of the grounds are vague, for instance ground No. 5 and that, therefore, the principle in *Dr. Ram Krishan Bhardwaj* v. *The State of Delhi*[1], applies to these cases. I have considered carfully all the grounds. I do not find any such vaugeness as would handicap the detenu in making proper representation to the Advisory Board. Indeed the grounds furnished to the detenus in these cases are very elaborate and fairly exhaustive. The obligation of the Government to furnish grounds which are not vague cannot be taken to mean that they must furnish every meticulous detail. I am satisfied that the detenus in these cases could have no grievance against the detention orders on the ground of vagueness of any one of the grounds therein.

None of the argumets addressed to me challenging the validity of the orders of detention are sustainable. These applications were accordingly liable to be dismissed and have accordingly been dismissed by my orders pronounced in Court on the 12th August, 1955.

Applications dismissed.

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1. (1953) S.C.R. 708 : (1953) S.C.J. 444.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—S. R. DAS, *Ag. Chief Justice*, VIVIAN BOSE, N. H. BHAGWATI, B. JAGANNADHADAS, T. L. VENKATARAMA AYYAR, B. P. SINHA AND SYED JAFER IMAM, JJ.

The Bengal Immunity Comppany, Limited .. *Appellant**

v.

The State of Bihar and others .. *Respondents.*

States of W. Bengal, Madras, Mysore, Orissa, Uttar, Pradesh, Pepsu, Madhya Pradesh, Rajasthan, Trav.-Cochin, Punjab, Tata Iron & Steel Co., and M. K. Kuriakose .. *Interveners.*

Constitution of India (1950), *Article* 286—*Scope—Inter-State trade—Delivery State how far competent to levy sales-tax—Bihar Sales-tax Act—Constitutional validity—Article* 226 *of the Constitution—Prerogative writs under—When sustainable.*

Practice—Power of Supreme Court to reconsider its own previous decision—Article 141 *of the Constitution—Scope.*

By the majority (Das, A.C.J., Bose, Bhagwati and Imam, JJ. with Jagannadhadas, Venkatarama Ayyar and Sinha, JJ., dissenting).—In the Bihar Sales-tax Act there are various provisions laying down conditions which dealers must comply with or submit to, namely, to give only a few instances, compulsory registration of dealers (section 10), filing of returns (section 12), attendance and production of evidence in support of the return (section 13), production, inspection and seizure of books of account or documents and search of premises (section 17). Section 26 prescribes penalties for contravention of the provisions of the Act. These and other provisions in the Act undoubtedly constitute restrictions on the fundamental right to carry on business which is guaranteed to every citizen of India by Article 19 (1) (*g*) of the Constitution. If as contended the Act is *ultra vires* the Constitution and consequently void these onerous conditions can never be justified as reasonable restrictions within the meaning of clause (6) of that Article.

It is clear from Article 265 of the Constitution that no tax can be levied or collected except by authority of law which must mean a good and valid law. If the contention that the Act (Bihar Sales-tax Act) which authorises the assessment, levy and collection of sales-tax on inter-State, trade contravenes and constitutes an infringement of Article 286 and is, therefore, *ultra vires*, void and unenforceable, is well founded, the remedy by way of writ must, on principle and authority, be available to the party aggrieved.

A person served with a notice directing him to do something, it is not reasonable to expect him to ignore it on the ground that it is illegal, for he can only do so at his own risk and peril. He has a right to be told definitely by the proper legal authority exactly where he stands and what he may or may not do. Where a party comes to Court with an allegation that his right has been or is being threatened to be infringed by a law which is *ultra vires* the powers of the legislature which enacted it and as such void and prays for appropriate relief under Article 226, it cannot be contended that the party is not entitled to take proceedings for the issue of prerogative writs under Article 226 as he had adequate alternate remedies under the impugned Act. In such a case the remedy under the Act cannot be said to be adequate and is, indeed, nugatory or useless if the Act which provides for such remedy is itself *ultra vires* and void.

The operative portions of the several parts of Article 286 (of the Constitution) namely, clause (1) (*a*), clause (1) (*b*), clause (2) and clause (3) are manifestly intended to deal with different topics and therefore, one cannot be projected or read into another. The *Explanation* in clause (1) (*a*) cannot be legitimately extended to clause (2) either as an exception or as a proviso thereto or read as curtailing or limiting the ambit of clause (2). It must follow that except in so far as Parliament may by law provide otherwise, no State law can impose or authorise the imposition of any tax on sales or purchases when such sales or purchases take place in the course of inter-State trade or commerce and irrespective of whether such sales or purchases do or do not fall within the *Explanation*. The delivery

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* Civil Appeal No. 159 of 1953. 6th September, 1955.

State cannot tax by reason of clause (2), although the sales fall within the *Explanation* and other States cannot tax by reason of both clause (1) (*a*) read with the *Explanation* and clause (2).

Majority decision in *The State of Bombay* v. *The United Motors, Ltd.* (1953) S.C.R. 1069: (1953) S.C.J. 373: (1953) 1 M.L.J. 743 (S.C.) *disapproved.*

The Bihar Sales-tax Act imposes tax on subjects divisible in their nature but does not exclude in express terms subjects exempted by the Constitution. In such a situation the Act need not be declared wholly *ultra vires* and void, for it is feasible to separate taxes levied on exempted subjects and to exclude the latter in the assessment of tax.

There is nothing in our Constitution which prevents the Supreme Court from departing from a previous decision if the Court is convinced of its error and its harmful effect on the general interests of the public. Article 141 which lays down that the law declared by the Supreme Court shall be binding on all Courts within the territory of India quite obviously refers to the Courts other than the Supreme Court.

Principles as to error and review and case-law reviewed.

Appeal under Article 132 (1) of the Constitution of India from the Judgment and Order dated the 4th December, 1952, of the High Court of Judicature at Patna in Misc. Judicial Case No. 241 of 1952.

N. C. Chatterjee, Senior Advocate (*S. N. Mukherjee, V. S. Sawhney* and *R. R. Biswas*, Advocates, with him, for Appellant.

Lal Narain Sinha, Senior Advocate (*B. K. P. Sinha* and *R. C. Prasad*, Advocates, with him) for Respondents.

M. C. Setalvad, Attorney-General of India (*B. Sen* and *P. K. Bose*, Advocates, with him) for the State of West Bengal.

V. K. T. Chari, Advocate-General of Madras (*K. Veeraswami* and *P. G. Gokhale*, Advocates, with him) for the State of Madras.

Nittoor Sreenivasa Rao, Advocate-General of Mysore (*R. Ganapathy Iyer* and *P. G. Gokhale*, Advocates, with him) for the State of Mysore.

Porus A. Mehta and *P. G. Gokhale*, Advocates, for the State of Orissa.

K. B. Asthana and *C. P. Lal*, Advocates, for the State of Uttar Pradesh.

Lachman Das Kaushal, Advocate-General of Pepsu (*P. G. Gokhale*, Advocate, with him) for the State of Pepsu.

T. L. Shevde, Advocate-General of Madhya Pradesh (*M. Adhikari*, Deputy Advocate-General and *I. N. Shroff*, Advocate, with him) for the State of Madhya Pradesh.

K. S. Hajela, Advocate-General of Rajasthan (*P. G. Gokhale*, Advocate, with him) for the State of Rajasthan.

T. R. Balakrishnan and *Sardar Bahadur Saharya*, Advocates for the State of Travancore-Cochin.

S. M. Sikri, Advocate-General of Punjab (*Jindra Lal* and *P. G. Gokhale*, Advocates, with him) for the State of Punjab.

M. C. Setalvad, Attorney-General of India (*Rajeswari Prasad* and *S. P. Varma*, Advocates, with him) for Tata Iron & Steel & Co. Ltd.

T. N. Subramanya Iyer, Senior Advocate, (*T. V. R. Tatachari,* Advocate, with him) for M. K. Kuriakose.

The Judgment of the Court was delivered by

Das, A.C.J.—This appeal filed under a certificate of fitness granted by the High Court of Patna, is directed against the Judgment of that High Court pronounced on the 4th December, 1952, whereby it dismissed the application made by the appellant company under Article 226 of the Constitution praying for an appropriate writ or order quashing "the proceedings issued by the opposite parties for the purpose of levying and realising a tax which is not lawfully leviable on the petitioners" and for another ancillary reliefs.

The relevant facts appearing from the petition filed in support of the appellant company's aforesaid application are as follows: The appellant company is an incorporated company carrying on the business of manufacturing and selling various sera, vaccines, biological products and medicines. Its registered head office is at Calcutta and its laboratory and factory are at Baranagar in the district of 24-Perganas in West Bengal. It is registered as a dealer under the Bengal Finance (Sales Tax) Act and its registered number is S. L. 683A. Its products have extensive sales throughout the Union of India and abroad. The goods are despatched from Calcutta by rail, steamer or air against orders accepted by the appellant company in Calcutta. The appellant company has neither any agent or manager in Bihar nor any office, godown or laboratory in that State. On the 24th October, 1951, the Assistant Superintendent of Commercial Taxes, Bihar wrote a letter to the appellant company which concluded as follows:—

"Necessary action may therefore be taken to get your firm registered under the Bihar Sales Tax Act. Steps may kindly be taken to deposit Bihar Sales Tax dues in any Bihar Treasury at an early date under intimation to this Department".

On the 18th December, 1951, a notice was issued by the Superintendent, Commercial Taxes, Central Circle Bihar, Patna calling upon the appellant company (*i*) to apply for registration and (*ii*) to submit returns showing its turnover for the period commencing from the 26th January, 1950 and ending with the 30th September, 1951. This notice was issued under section 13 (5) of the Bihar Sales Tax Act, 1947 (hereinafter called the Act) read with rule 28. It was drawn up according to Form No. 8 prescribed by the rules and was headed "Notice of hearing under section 13 (5)". The reason for issuing this notice, as recited therein, was that on information which had come to his possession the Superintendent was satisfied that the appellant company was liable to pay tax but had nevertheless wilfully failed to apply for registration under the Act. Thereafter there was some correspondence between the appellant company and the Bihar sales tax authorities to which it is not necessary to refer in detail. Suffice it to say that while the appellant company denied its liability on the ground, *inter alia*, that it was not resident in Bihar, it carried on no business there, none of its sales took place in Bihar and that it did not collect any sales-tax from any person of that State, the Bihar sales tax authorities maintained that under section 33, which was substantially based on Article 286 of the Constitution and was inserted in the Act by the President's Adaptation Order promulgated on the 4th April, 1951, all sales in West Bengal or any other State under which the goods had been delivered in the State of Bihar as a direct result of the sale for the purpose of consumption in that State were liable to Bihar sales tax. Eventually on the 29th May, 1952, the Assistant Superintendent of sales tax, Bihar, called upon the appellant company to comply with the notice by the 14th June, 1952 and threatened that, in default of compliance, he would proceed to take steps for assessment to the best of his judgment. The appellant company by its letter, dated the 7th June, 1952, characterised the notice under section 13 (5) as *ultra vires* and entirely illegal

and called upon the Superintendent to forthwith rescind and cancel the same. On the 10th June, 1952, the appellant company presented before the High Court at Patna a petition under Article 226 claiming the reliefs hereinbefore mentioned. The respondents did not file any affidavit in opposition controverting any of the allegations of facts made in the petition and it must, accordingly, be taken that those facts are admitted as correct by the respondents. The High Court dismissed the petition on the 4th December, 1952, but on the next day issued a certificate, under Article 132 (1) of the Constitution, that the case involved a substantial question of law as to the interpretation of the Constitution. Hence the present appeal.

In view of the importance of the issues involved in this appeal the States of Madras, Uttar Pradesh, Madhya Pradesh, West Bengal, Orissa, Punjab, Pepsu, Mysore, Travancore-Cochin and Rajasthan applied for and obtained leave to intervene in this appeal. Similar leave was applied for by and was granted to Tata Iron and Steel Company, Ltd., and one M. K. Kuriakose. The State of West Bengal, Tata Iron & Steel Company, Ltd., and M. K. Kuriakose have supported the appellant company while the rest of the interveners have opposed the appeal.

Before the High Court the question of maintainability of the petition was raised by the respondents as a preliminary objection and it was answered in their favour by the High Court. In its judgment the High Court noticed that facts had not been investigated nor had the liability of the appellant company been determined and that in fact no order of assessment had been made. It pointed out that it was not a case for the Sales Tax Officer usurping a jurisdiction not vested in him by law or acting in excess of his jurisdiction or acting *mala fide*. The High Court took the view that the Act undoubtedly conferred jurisdiction on the Sales Tax Officer to investigate the question of liability of a dealer to sales tax under the Act and accordingly he was acting well within his jurisdiction in issuing the impugned notice. If on assessment the Sales Tax Officer erroneously holds the appellant liable to any tax, the Act provides for rectifying that error by appeal or revision under sections 24 and 25 of the Act. According to the High Court such a decision, however erroneous, will, nevertheless, be a decision within the ambit of his jurisdiction and the High Court cannot interfere with it by a writ of prohibition or *certiorari* to quash. The High Court accordingly held that the petition was not maintainable and was liable to be dismissed.

We are unable to agree with the above conclusion. In reaching that conclusion the High Court appears to have overlooked the fact that the main contention of the appellant company, as set forth in its petition, is that the Act in so far as it purports to tax a non-resident dealer in respect of an inter-State sale or purchase of goods, is *ultra vires* the Constitution and wholly illegal. In the impugned Act there are various provisions laying down conditions which dealers must comply with or submit to, namely, to give only a few instances, compulsory registration of dealers (Sec. 10), filing of returns (Sec. 12), attendance and production of evidence in support of the return (Sec. 13), production, inspection and seizure of books of account or documents and search of premises (Sec. 17). Section 26 prescribes penalties for contravention of the provisions of the Act. These and other like provisions in the Act undoubtedly constitute restrictions on the fundamental right to carry on business which is guaranteed to every citizen of India by Article 19 (1) (*g*) of the Constitution. If, as contended, the Act is *ultra vires* the Constitution and consequently void these onerous conditions can never be justified as reasonable restrictions within the meaning of clause (6) of that Article as this Court held

in the case of *Mohammad Yasin* v. *The Town Area Committee, Jalalabad*[1]. The same view was also expressed in the *State of Bombay* v. *The United Motors (India) Ltd.*[2], and again only recently in *Himmatlal Harilal Mehta* v. *The State of Madhya Pradesh*[3].

It is urged that the appellant being a company is not a citizen and cannot, therefore, claim any fundamental right under Article 19 which is available only to citizens and, therefore, the decisions of this Court referred to above have no application. While it is noteworthy that the second case mentioned above was concerned with the rights of a company, it is, nevertheless, unnecessary, for the purposes of this appeal, to decide whether a juristic person like a company is a citizen as defined in Part II of the Constitution and as such entitled to the benefits of Article 19. Nor is it necessary to consider whether there has been any infraction of the right to equal protection of the laws guaranteed by Article 14 in that being a juristic person it cannot claim any of the rights under Article 19 which only citizens can do. It is also true that Article 31 which protects citizens and non-citizens alike cannot be availed of as it deals with deprivation of property otherwise than by way of levying or collecting taxes as held by this Court in *Ramjilal* v. *Income-Tax Officer, Mohindargarh*[4] and that, therefore, the Act does not constitute an infringement of the fundamental right to property under that Article. It is, however, clear from Article 265 that no tax can be levied or collected except by authority of law which must mean a good and valid law. The contention of the appellant company is that the Act which authorises the assessment, levying and collection of sales-tax on inter-State trade contravenes and constitutes an infringement of Article 286 and is therefore, *ultra vires*, void and unenforceable. If, therefore this contention be well founded, the remedy by way of a writ must, on principle and authority, be available to the party aggrieved.

It has been argued that the application was premature, for there has, so far, been no investigation or finding on facts and no assessment under section 13 of the Act. The appellant company, contending, as it does, that the Act is *ultra vires* and void, should have ignored the notice served on it and should not have rushed into Court at this stage. This line of argument appears to us to be utterly untenable. In the first place, it ignores the plain fact that this notice, calling upon the appellant company to forthwith get itself registered as a dealer, and to submit a return and to deposit the tax in a treasury in Bihar, places upon it considerable hardship, harassment and liability which, if the Act is void under Article 265 read with Article 286 constitute, *in presenti*, an encroachment on and an infringement of its right which entitles it to immediately appeal to the appropriate Court for redress. In the next place, as was said by this Court in *Commissioner of Police, Bombay* v. *Gordhandas Bhanji*,[5] when an order or notice emanates from the State Government or any of its responsible officers directing a person to do something, then, although the order or notice may eventually transpire to be *ultra vires* and bad in law, it is obviously one which *prima facie* compels obedience as a matter of prudence and precaution. It is, therefore, not reasonable to expect the person served with such an order or notice to ignore it on the ground that it is illegal, for he can only do so at his own risk and peril. This Court has said in the last-mentioned case that a person placed in such a situation has the right to be told definitely by the proper legal authority exactly where he stands and what he may or may not do.

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1. (1952) 3 S.C.R. 572 : (1952) S.C.J. 162 (S.C.).
2. (1953) 4 S.C.R. 1069 at p. 1077 : (1953) S.C.J. 373 : (1953) 1 M.L.J. 743 (S.C.).
3. (1954) 5 S.C.R. 1122 at p. 1127 : (1954) S.C.J. 445 : (1954) 1 M.L.J. 690 (S.C.).
4. (1951) 2 S.C.R. 127 : (1951) S.C.J. 203 : (1951) 1 M.L.J. 384 (S.C.).
5. (1952) 3 S.C.R. 135 at pp. 148, 149 (1951) S.C.J. 803 (S.C.).

Another plea advanced by the respondent State is that the appellant company is not entitled to take proceedings praying for the issue of prerogative writs under Article 226 as it has adequate alternative remedy under the impugned Act by way of appeal or revision. The answer to this plea is short and simple. The remedy under the Act cannot be said to be adequate and is, indeed, nugatory or useless if the Act which provides for such remedy is itself *ultra vires* and void and the principle relied upon can, therefore, have no application where a party comes to Court with an allegation that his right has been or is being threatened to be infringed by a law which is *ultra vires* the powers of the legislature which enacted it and as such void and prays for appropriate relief under Article 226. As said by this Court in *Himmatlal Harilal Mehta* v. *The State of Madhya Pradesh*[1] this plea of the State stands negatived by the decision of this Court in *The State of Bombay* v. *The United Motors (India) Ltd.*[2]. We are, therefore, of the opinion, for seasons stated above, that the High Court was not right in holding that the petition under Article 226 was misconceived or was not maintainable. It will, therefore, have to be examined and decided on merits.

Coming, then, to the merits of the petition, the principal question is whether the tax threatened to be levied on the sales made by the appellant company and implemented by delivery in the circumstances and manner mentioned in its petition is leviable by the State of Bihar. The legal capacity of the State of Bihar to tax these sales is questioned on the following grounds, namely :—

(A) that the sales sought to be taxed having taken place in the course of inter-State trade or commerce and Parliament not having by law provided otherwise, all States are debarred from imposing tax on such sales by reason of Article 286 (2);

(B) that even if the ban under Article 286 (2) did not apply, the State of Bihar is not competent to impose tax on such sales on a correct reading of Article 246 (3) read with Entry 54 of List II in the Seventh Schedule and Article 286 (1);

(C) that the Bihar Sales Tax Act, 1947, can have no extra-territorial operation and cannot, therefore, impose tax on such sales by a non-resident seller;

(D) that on a true construction of the Act itself, it does not apply to the sales sought to be taxed.

Re (A): The main controversy in this appeal has centred round this ground. It raises a question of construction of Article 286 of the Constitution. In the judgment under appeal the High Court took the view that sales or purchases in the course of inter-State trade or commerce referred to in Article 286 (2) must be construed so as to exclude the particular class of sales or purchases described in the *Explanation* to clause (*a*) of Article 286 (1) and that, therefore, the provisions of the Bihar Sales Tax Act, 1947, in so far as they purported to impose tax on such sales, were not in conflict which Article 286 (2) as so construed. After this decision of the Patna High Court the question came up for consideration before a Constitution Bench of this Court in *The State of Bombay* v. *The United Motors (India) Ltd.*[2] The majority of that Bench held that Aricle 286 (1) (*a*), read with the *Explanation* thereto and construed in the light of Articles 301 and 304, prohibited the taxation of sales or purchases involving inter-State elements by all States except the State in which the goods were actually delivered for the purpose of consumption therein and that clause (2) of Article 286 did not affect the power of the State in which delivery of the goods was so made to tax the sales or purchases of the kind mentioned in the *Explana-*

1. (1954) 5 S.C.R. 1122 at p. 1127 : (1954) S.C.J. 445 : (1954) 1 M.L.J. 690 (S.C.).

2. (1953) 4 S.C.R. 1069 at p. 1077 : (1953) S.C.J. 373 : (1953) 1 M.L.J. 743 (S.C.).

tion, the effect of which was to convert such inter-State transactions into intra-State transactions and to take them out of the operation of clause (2) of that Article. It is quite clear that if this majority view is to prevail this ground urged by learned counsel for the appellant company and strongly supported by the learned Attorney-General appearing for the interveners, the State of West Bengal and Tata Iron and Steel Company Ltd., and by learned counsel for M. K. Kuriakose must fail. It has, accordingly, been pressed upon us that we are not bound by the majority decision in that appeal from Bombay and that it is still open to us to examine and ascertain for ourselves the true meaning, import and scope of the Article in question. Learned counsel for some of the interveners question our authority to go behind the majority decision. It is, therefore, necessary at this stage to determine this preliminary question before entering upon a detailed discussion on the question of contruction of Article 286.

In England, the Court of Appeal has imposed upon its power of review of earlier precedents a limitation, subject to certain exceptions. The limitation thus accepted is that it is bound to follow its own decisions and those of Courts of co-ordinate jurisdiction, and the "full" Court is in the same position in this respect as a division Court consisting of three members. The only exceptions to this rule are: (1) the Court is entitled and bound to decide which of the two conflicting decisions of its own it will follow; (2) the Court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion stand with a decision of the House of Lords; and (3) the Court is not bound to follow a decision of its own, if it is satisfied that the decision was given *per incuriam, e.g.,* where a Statute or a rule having statutory effect which would have affected the decision was not brought to the attention of the earlier Court. [See *Young* v. *Bristol Aeroplane Co., Ltd.,*[1] which, on appeal to the House of Lords, was approved by Viscount Simon in L.R. 1946 A.C. 163 at page 169.] A decision of the House of Lords upon a question of law is conclusive and binds the House in subsequent case. An erroneous decision of the House of Lords can be set right only by an Act of Parliament. [See *Street Tramways* v. *London County Council.*[2]] This limitation was repeated by Lord Wright in *Radcliffe* v. *Ribble Motor Services, Ltd.*[3]

The High Court in Australia, which is the highest Court in that Commonwealth, has not adopted such a rigid rule. In the *Tramways case*[4] the rule was thus laid down by Griffith C.J., at page 58:

> "In my opinion, it is impossible to maintain an abstract proposition that Court is either legally or technically bound by previous decisions. Indeed, it may, in a proper case, be its duty to disregard them. But the rule should be applied with great caution, and only when the previous decision is manifestly wrong, as, for instance, if it proceeded upon the mistaken assumption of the continuance of a repealed or expired Statute, or is contrary to a decision of another Court which this Court is bound to follow; not, I think, upon a mere suggestion that some or all of the members of the later Court might arrive at a different conclusion if the matter was *res integra*. Otherwise there would be grave danger of want of continuity in the interpretation of law".

In the same case Barton, J., in the concluding paragraph of his judgment at page 69 expressed himself thus:

> "In conclusion, I would say that I never thought that it was not open to this Court to review its previous decisions upon good cause. The question is not whether the Court can do so, but whether it will, having due regard to the need for continuity and consistency in the judicial decision. Changes in the number of appointed Justices can, I take it, never of themselves furnish a reason for review. That the prior decision was that of little more than half their number might be urged with greater fairness, but it cannot be urged against *Whybrow's case* which was decided by the whole Court then in existence save the Justice who as President of the Arbitration Court, was a party respondent to the order *nisi* But the

1. L.R. 1944 K.B. 718 C.A.
2. (1898) A.C. 375.
3. (1939) A.C. 215 at p. 245.
4. (1914) 18 C.L.R. 54.

Court can always listen to argument as to whether it ought to review a particular decision, and the strongest reason for an overruling is that a decision is manifestly wrong and its continuance is injurious to the public interest".

It is interesting to note that in that case all the Judges agreed that the decision in *Whybrow's case* was to be treated as open to review (Per Griffith, C.J. at page 58) although in the end, after reviewing the position afresh in the light of new arguments advanced before it, the Court came to the same conclusion. *Amalgamated Society of Engineers* v. *Adelaide Steamship Company*[1] may also be referred to as an instance where the High Court of Australia departed from its previous decision.

In the United States of America there have been a considerable number of cases in which the Supreme Court has explicitly and avowedly overruled its prior decisions but there have been more instances in which the doctrines declared in prior cases have been in part evaded or modified without explicit repudiation. (Willoughby: Constitution of the United States, "2nd Ed., Vol. 1, pp. 74-75). In *State of Washington* v. *Dawson & Co.*[2] Brandies, J., in his dissenting judgment said:

"The doctrine of *stare decisis* should not deter us from overruling that case and those which follow it. The decisions are recent ones. They have not been acquiesced in. They have not created a rule of property around which vested interests have clustered. They affect solely matters of a transitory nature. On the other hand, they affect seriously the lives of men, women and children, and the general welfare. *Stare decisis* is ordinarily a wise rule of action. But it is not a universal, inexorable command. The instances in which the Courts have disregarded its admonition are many".

In a foot-note to this judgment the learned Judge set out a large number of instances where the earlier decisions had been overruled. In another dissenting judgment in *David Burnet* v. *Coronado Oil & Gas Company,*[3] the same learned Judge after quoting a passage from the judgment of Mr. Justice Lurton in *Hertz* v. *Woodman,*[4] proceeded to say:

"*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled right. Compare *National Bank* v. *Whitney,*[5] This is commonly true even where the error is a matter of serious concern provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning recognising that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function".

In his separate but concurring judgment in *Mark Graves* v. *People of the State of New York,*[6] Frankfurter, J., observed:

"Judicial exegesis is unavoidable with reference to an act like our Constitution, drawn in many particulars with purposed vagueness so as to leave room for the unfolding future. But the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it".

In this case two previous decisions were expressly overruled and two more were impliedly overruled.

We now come to the Privy Council which, prior to the commencement of our Constitution, was the highest Court of Appeal to hear appeals from the Indian High Courts. In a case about *Compensation to Civil Servants,*[7] in repelling the contention that the Board was bound in law, and without examination, to follow an earlier decision whether they considered it right or wrong the Marquess of Reading said:

1. (1920) 28 C.L.R. 129.
2. 264 U.S. 646 : 68 L Ed. 219.
3. 285 U.S. 393 : 76 L.Ed. 815.
4. 218 U.S. 205 at p. 212 : 54 L.Ed. 1001 at p. 1005.
5. 103 U.S. 99 : 26 L.Ed. 443-444.
6. 306 U.S. 466 : 83 L.Ed. 927.
7. L.R. (1929) A.C. 242 : A.I.R. 1929 P.C. 84 at p. 87 : 56 M.L.J. 363 (P.C.).

"Their Lordships are unable to hold that this proposition stated in such an extreme form is established. It may well be said that the Board would hesitate long before disturbing a solemn decision by a previous Board, which raised an identical or even a similar issue for determination; but for the proposition that the Board is, in all circumstances, bound to follow a previous decision, as it were, blindfold, they are unable to discover any adequate authority. In other words, no inflexible rule, which falls in all circumstances to be applied, has been laid down".

In the *Attorney-General of Ontario* v. *The Canada Temperance Federation*[1] Viscount Simon stated the practice of the Board in the following terms:

"Their Lordships do not doubt that in tendering humble advice to His Majesty, they are not absolutely bound by previous decisions of the Board, as is the House of Lords by its own judgments. In ecclesiastical appeals, for instance, on more than one occasion the Board has tendered advice contrary to that given in a previous case, which further historical research has shown to have been wrong. But on constitutional questions it must be seldom indeed that the Board would depart from a previous decision which it may be assumed will have been acted upon both by Governments and subjects".

Finally, in *Phanindra Chandra Neogy* v. *The King*,[2] Lord Simonds said at page 88:

"Their Lordships then have before them a decision upon facts which in no material respect differ from those of the present case. Even so, it is, as they recognise, competent for them humbly to tender advice to His Majesty inconsistent with a previous decision, though it can only be in most exceptional circumstances that such a course should be taken........ ....Recognising the possibility, they have heard full argument and, having done so see no reason to doubt the validity of the reasoning or the correctness of the conclusion in *Gill's case*, and they do not think it necessary to repeat what was said there".

In considering the applicability of the principles laid down in the decisions hereinbefore mentioned, it should be borne in mind that the English decisions may well have been influenced by considerations which can no longer apply to the circumstances prevailing in India. The error, if any, of the Court of Appeal in England, may be corrected by the House of Lords or eventually by Parliament by a simple majority. The mistakes, if any, made by the High Court of Australia, if not corrected by itself in a subsequent case, could be set right by the Privy Council when appeals were taken there or by the appropriate legislative authority. An error made by the House of Lords or the Privy Council can easily be rectified by Parliament by a simple majority by an amending statute. But in a country governed by a federal Constitution, such as the United States of America and the Union of India are, it is by no means easy to amend the Constitution if an erroneous interpretation is put upon it by this Court. (*See* Article 368 of our Constitution). An erroneous interpretation of the Constitution may quite conceivably be perpetuated or may at any rate remain unrectified for a considerable time to the great detriment to public wellbeing. The considerations adverted to in the decisions of the Supreme Court of America quoted above are, therefore, apposite and apply in full force in determining whether a previous decision of this Court should or should not be disregarded or overruled. There is nothing in our Constitution which prevents us from departing from a previous decision if we are convinced of its error and its baneful effect on the general interests of the public. Article 141 which lays down that the law declared by this Court shall be binding on all Courts within the territory of India quite obviously refers to Courts other than this Court. The corresponding provision of the Government of India Act, 1935, also makes it clear that the Courts contemplated are the Subordinate Courts.

There are several circumstances relating to the majority decision of the Court in *The State of Bombay* v. *The United Motors (India) Ltd.*,[3] to

1. (1946) 50 C.W.N. 535 : A.I.R. 1946 P.C. 88.
2. (1949) 1 M.L.J. 177 : L.R. 76 I.A. 10: 4 D.L.R. (P.C.) 87 (P.C.).
3. (1953) 4 S.C.R. 1069 at p. 1077 : (1953) S.C.J. 373 : (1953) 1 M.L.J. 743 (S.C.).

which reference must be made. That appeal was heard immediately before the hearing of the appeal reported as *The State of Travancore-Cochin* v. *Shanmugha Vilas Cashew Nut Factory*,[1] commenced. The two appeals were, as a matter of fact, heard one after the other and judgments were reserved in both of them. The Constitution of the Benches was, however, different. In the first appeal one of the Judges of that Bench expressly differed from the majority decision and another learned Judge did not accept the majority decision on many points. In the second appeal one Judge of the Bench, who was not a party to the first appeal, differed from the majority decision in the first appeal. The result, therefore, was that the majority decision was definitely differed from by two Judges. Bhagwati, J., has now in the judgment he has written in the present appeal which we have had the advantage of reading reconsidered the matter and on further reflection he thinks that the majority decision on the present issue was erroneous and he now agrees substantially with the view of Article 286 (1) (*a*) read with the *Explanation* and Article 286 (2) which was expressed in the two minority judgments referred to above and which is adopted in the judgment now being delivered in the present appeal. If Bhagwati, J., had then expressed the views he is now doing, then the majority in the Bombay appeal would have been 3 to 2 and if we add the opinion of the dissenting Judge in the Travancore-Cochin appeal then judicial opinion would have been divided 3 to 3. In this juxtaposition it is difficult to give the majority decision in the Bombay appeal that amount of sanctity and reverence which is usually attributed to an unretracted majority decision of this Court.

The majority decision does not merely determine the rights of the two contending parties to the Bombay appeal. Its effect is far-reaching as it affects the rights of all consuming public. It authorises the imposition and levying of a tax by the State on an interpretation of a constitutional provision which appears to us to be unsupportable. To follow that interpretation will result in perpetuating what, with humility we say, is an error and in perpetuating a tax burden imposed on the people which, according to our considered opinion, is manifestly and wholly unauthorised. It is not an ordinary pronouncement declaring the rights of two private individuals *inter se*. It involves an adjudication on the taxing power of the States as against the consuming public generally. If the decision is erroneous, as indeed we conceive it to be, we owe it to that public to protect them against the illegal tax burdens which the States are seeking to impose on the strength of that erroneous recent decision.

The third circumstance is that there appears to be some vagueness, if not inconsistency, in the majority judgment itself. At page 1084 of the authorised report the majority judgment says:

> "The expression 'for the purpose of consumption in that State' must, in our opinion, be understood as having reference not merely to the individual importer or purchaser but as contemplating distribution eventually to consumers in general within the State. Thus all buyers within the State of delivery from out-of-State sellers, except those buying for re-export out of the State, would be within the scope of the *Explanation* and liable to be taxed by the State on their inter-State transactions".

This passage seems to suggest that it is only the buyers falling within the *Explanation* who are liable to be taxed by what has been called in the discussion before us as the delivery State. According to this passage, read by itself, the out-of-State sellers are not considered liable to be taxed on the sales. The whole trend of the rest of the majority judgment and the actual decision therein run

1. (1954) 5 S.C.R. 53 : (1953) S.C.J. 471 : (1953) 2 M.L.J. 123 (S.C.).

counter to this conclusion, for the out-of-State sellers were, by reason of the *Explanation*, subjected to the taxing power of the delivey State. Indeed, Bihar is claiming to tax the appellant company, an out-of-State seller, by virtue of the majority decision and all other States intervening and supporting Bihar read the judgment in that way and none of them accepts the quoted passage as containing the actual *ratio decidendi* of the majority judgment. This confusion, we consider, is also a cogent. reason for re-examining that decision.

Reference is made to the doctrine of finality of judicial decisions and it is pressed upon us that we should not reverse our previous decision except in cases where a material provision of law has been overlooked or where the decision has proceeded upon the mistaken assumption of the continuance of a repealed or expired statute and that we should not differ from a previous decision merely because a contrary view appears to us to be preferable. It is needless for us to say that we should not lightly dissent from a previous pronouncement of this Court. Our power of review, which undoubtedly exists, must be exercised with due care and caution and only for advancing the public well-being in the light of the surrounding circumstances of each case brought to our notice but we do not consider it right to confine our power within rigidly fixed limits as suggested before us. If on a re-examination of the question we come to the conclusion, as indeed we have, that the previous majority decision was plainly erroneous then it will be our duty to say so and not to perpetuate our mistake even when one learned Judge who was party to the previous decision considers it incorrect on further reflection. We should do so all the more readily as our decision is on a constitutional question and our erroneous decision has imposed illegal tax burden on the consuming public and has otherwise given rise to public inconvenience or hardship, for it is by no means easy to amend the Constitution. Someties frivolous attempts may be made to question our previous decisions but if the reasons on which our decisions are founded are sound they will by themselves be sufficient safeguard against such frivolous attempts. Further, the doctrine of *stare decisis* has hardly any application to an isolated and stray decision of the Court very recently made and not followed by a series of decisions based therein. The problem before us does not involve overruling a series of decisions but only involves the question as to whether we should approve or disapprove, follow or overrule, a very recent previous decision as a precedent. In any case, the doctrine of *stare decisis* is not an inflexible rule of law and cannot be permitted to perpetuate our errors to the detriment, to the general welfare of the public or a considerable section thereof.

It is pointed out that all the States are realising sales-tax in respect of sales or purchases of goods where the goods are actually delivered for consumption within their respective boundaries on the faith of our previous decision and a reversal of that decision will upset the economy of the States and will indeed render them liable to refund moneys already collected by them as taxes. This circumstance, it is pressed upon us, should alone deter us from differing from the previous decision. We are not impressed by this argument. It has not yet been decided by this Court that moneys paid under a mutual mistake of law induced by a wrong judicial interpretation of a statute or the Constitution must necessarily be refundable as money had and received. If, as contended, moneys so paid are in law refundable the States cannot complain any more than a private individual in similar circumstances could do. Finally, if the State economy is upset the appeal must be to Parliament which under Article 286 (2) itself has ample power to make suitable legislation.

The impugned decision is a recent one. The judicial opinion was divided, if not evenly balanced. One of the four Judges who formed the majority has

revised his opinion as stated above. The decision on the point noted above seems to be somewhat inconsistent and is, at any rate, not quite clear. It has encouraged the imposition of tax burdens on the consuming public on an interpretation of the Constitution which appears to us to be plainly erroneous. It has given rise to considerable inconvenience and hardship to business people who have not acquiesced in it by any means. To rectify the error by the legislative process is difficult, for a constitutional amendment requires a specified majority which may not always be available and if it involves an amendment of the legislative lists it will require the consent of a requisite number of the States which, in this instance, cannot reasonably be expected. In the premises, we think that it is precisely a case where, in the public interests, the meaning, scope and effect of Article 286 should be re-examined afresh in the light of the fresh arguments now advanced before us and the experience we have since acquired. In our judgment the majority decision in *The State of Bombay* v. *The United Motors (India) Ltd*[1]., is, in the circumstances alluded to, open to review and we are entitled to re-examine Article 286 in order to ascertain its true meaning, scope and effect so far as it is necessary for the purposes of this appeal and we proceed on this basis.

It is a sound rule of construction of a statute firmly established in England as far back as 1584 when *Heydon's case*[2] was decided that—

> ". ....for the sure and true interpretation of all Statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered.—
>
> 1st. What was the common law before the making of the Act.
>
> 2nd. What was the mischief and defect for which the common law did not provide.
>
> 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth, and
>
> 4th. The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*".

In In re *Mayfair Property Company*,[3] Lindley, M. R., in 1898 found the rule "as necessary now as it was when Lord Coke reported *Heydon's Case*"[2]. In *Eastman Photographic Material Company* v. *Comptroller General of Patents, Designs and Trade Marks*[4] Earl of Halsbury re-affirmed the rule as follows:

> "My Lords, it appears of me that to construe the Statute in question, it is not only legitimate but highly convenient to refer both to the former Act and to the ascertained evils to which the former Act had given rise, and to the later Act which provided the remedy. These three being compared I cannot doubt the conclusion".

It appears to us that this rule is equally applicable to the construction of Article 286 of our Constitution. In order to properly interpret the provisions of that Article it is, therefore, necessary to consider how the matter stood immediately before the Constitution came into force, what the mischief was for which the old law did not provide and the remedy which has been provided by the Constitution to cure that mischief.

The position with respect to taxation on sales or purchases of goods that prevailed in the country had better be stated in the language of Patanjali Sastri, C.J. who delivered the majority judgment in the *State of Bombay* v. *The United Motors (India) Ltd.*[1] After expressing the view based on the authority of the *Wallace Brothers' Case*,[5] that in the case of sale-tax, it

1. (1953) 4 S.C.R. 1069 : (1953) S.C.J. 373: (1953) 1 M.L.J. 743 (S.C.).
2. 3 Co. Rep. 7a : 76 E.R. 637.
3. L.R. (1898) 2 Ch. 28 at p. 35.
4. L.R. (1898) A.C. 571 at p. 576.
5. 1948 F.C.R. 1 : L.R. 75 I.A. 86 : (1948) 2 M.L.J. 62 (P.C.).

was not necessary that the sale should take place within the territorial limits of the State in the sense that all the ingredients of a sale, like the agreement to sell, the passing of title, delivery of the goods, etc., should have a territorial connection with the State and that, broadly speaking, local activities of buying and selling carried on in the State in relation to local goods would be a sufficient basis to sustain the taxing power of the State, provided of course that such activities ultimately resulted in a concluded sale to be taxed, the learned Chief Justice proceeded to say:—

"In exercise of the legislative power conferred upon them in substantially similar terms by the Government of India Act, 1935, the Provincial Legislatures enacted sales-tax laws for their respective Provinces, acting on the principle of territorial nexus referred to above; that is to say, they picked out one or more of the ingredients constituting a sale and made them the basis of their sales-tax legislation. Assam and Bengal made, among other things, the actual existence of the goods in the Province at the time of the contract of sale the test of taxability. In Bihar the production or manufacture of the goods in the Province was made an additional ground. A net of the widest range perhaps was laid in the Central Provinces and Berar where it was sufficient if the goods were actually "found" in the Province at any time after the contract of sale or purchase in respect thereof was made. Whether the territorial nexus put forward as the basis of the taxing power in each case would be sustained as sufficient was a matter of doubt not having been tested in a Court of law. And such claims to taxing power led to multiple taxation of the same transaction by Provinces and cumulation of the burden falling ultimately on the consuming public. This situation posed to the Constitution-makers the problem of restricting the taxing power on sales or purchases involving inter-State elements, and alleviating the tax burden on the consumer. At the same time they were evidently anxious to maintain the State power of imposing non-discriminatory taxes on goods imported from other States, while upholding the economic unity of India by providing for the freedom of inter-State trade and commerce. In their attempt to harmonise and achieve these somewhat conflicting objectives, they enacted Articles 286, 301 and 304"

Leaving out, for the moment, the question as to whether Articles 301 and 304 have any bearing on the question of construction of Article 286, as to which we entertain a contrary opinion, the above passage quite adequately depicts the picture of chaos and confusion that was brought about in inter-State trade or commerce by indiscriminate exercise of taxing power by the different Provincial Legislatures founded on the theory of territorial nexus between the respective Provinces and the sales or purchases sought to be taxed. It was to cure this mischief of multiple taxation and to preserve the free flow of inter-State trade or commerce in the Union of India regarded as one economic unit without any provincial barrier that the Constitution-makers adopted Article 286 in the Constitution which runs as follows:—

"286 (1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—

(*a*) outside the State; or

(*b*) in the course of the import of the goods into, or export of the goods out of, the territory of India.

Explanation.—For the purposes of sub-clause (*a*), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

(2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce:

Provided that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of this Constitution shall, notwithstanding that the imposition of such tax is contrary to the provisions of this clause, continue to be levied until the 31st day of March, 1951.

(3) No law made by the Legislature of a State imposing, or authorising the imposition of, a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent".

Article 286 is in Part XII of the Constitution which deals with "Finance Property, Contract and Suit". It is one of the several Articles which are grouped under the heading "Miscellaneous Financial Provisions" in Chapter I of that Part. It is to be noted that it has not found a place in Part XI, Chapter L whereof deals with "Legislative Relations" including "Distribution of Legislative Powers" between Parliament and the Legislatures of States. The marginal note to Article 286 is "Restrictions as to imposition of tax on the sale or purchase of goods", which, unlike the marginal notes in Acts of the British Parliament, is part of the Constituion as passed by the Constituent Assembly, *prima facie*, furnishes some clue as to the meaning and purpose of the Article. Apart from the marginal note, the very language of that Article makes it abundantly clear that its object is to place restrictions on the legislative power of the States with respect to the imposition of taxes on the sales or purchases of goods. It will be recalled that section 100 (3) of the Government of India Act, 1935, read with Entry 48 of List II of the Seventh Schedule to that Act gave power to the Provincial Legislatures to make laws with respect to "taxes on sale of goods and on advertisements". Pursuant to the legislative power thus conferred on them the Provincial Legislatures enacted Sales-tax Acts for their respective Provinces. Although in most of those Acts "sale" was first defined as meaning transfer of the property in the goods, so as to make the passing of the property within the Province the principal basis for the imposition of the tax, yet by means of Explanations to that definition, those Acts gave extended meanings to that word and thereby enlarged the scope of their operation. The imposition of tax on the sales or purchases of goods on the basis of a very slight territorial connection or nexus resulted in what has been graphically described by Patanjali Sastri, C.J. in the passage quoted above from the majority judgment in the Bombay appeal. This imposition of multiple taxes on one and the same transaction of sale or purchase was certainly calculated to hamper and discourage free flow of trade within India regarded as one economic unit. This undesirable state of affairs had to be put right. Therefore, while the Constitution-makers by Article 246 (3) read with Entry 54 in List II of the Seventh Schedule to the Constitution conferred power on the Legislatures of Part A and Part B States to make law with respect to "taxes on the sale or purchase of goods other than newspapers" they at the same time by Article 286 clamped on that legislative power several fetters. Broadly speaking, the fetters thus placed on the taxing power of the States are that no law of a State shall impose or authorise the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place, (*a*) outside the State or (*b*) in the course of import or export or (*c*) except in so far as Parliament otherwise provides, in the course of inter-State trade or commerce and lastly (*d*) that no law made by the Legislature of a State imposing or authorising the imposition of a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent. It should be noted that these are four separate and independent restrictions placed upon the legislative competency of the States to make a law with respect to matters enumerated in Entry 54 of List II. In order to make the ban effective and to leave no loophole the Constitution-makers have considered the different aspects of sales or purchases of goods and placed checks on the legislative power of the States at different angles. Thus in clause (1) (*a*) of Article 286 the question of the situs of a sale or purchase engaged their attention and they forged a

fetter on the basis of such situs to cure the mischief of multiple taxation by the States on the basis of the nexus theory. In clause (1) (b) they considered sales or purchases from the point of view of our foreign trade and placed a ban on the States' taxing power in order to make our foreign trade free from any interference by the States by way of a tax impost. In clause (2) they looked at sales or purchases in their inter-State character and imposed another ban in the interest of the freedom of internal trade. Finally, in clause (3) the Constitution-makers' attention was rivetted on the character and quality of the goods themselves and they placed a fourth restriction on the States' power of imposing tax on sales or purchases of goods declared to be essential for the life of the community. These several bans may overlap in some cases but in their respective scope and operation they are separate and independent. They deal with different phases of a sale or purchase but, nevertheless, they are distinct and one has nothing to do with and is not dependent on the other or others. The States' legislative power with respect to a sale or purchase may be hit by one or more of these bans. Thus, take the case of a sale of goods declared by Parliament as essential by a seller in West Bengal to a purchaser in Bihar in which goods are actually delivered as a direct result of such sale for consumption in the State of Bihar. A law made by West Bengal without the assent of the President taxing this sale will be unconstitutional because (1) it will offend Article 286 (1) (*a*) as the sale has taken place outside the territory by virtue of the Explanation to clause (1) (*a*), (2) it will also offend Article 286 (2) as the sale has taken place in the course of inter-State trade or commerce and (3) such law will also be contrary to Article 286 (3) as the goods are essential commodities and the President's assent to the law was not obtained as required by Clause (3) of Article 286. This appears to us to be the general scheme of that Article.

We come now to the particular bans. Although the Legislatures of the States weer empowered by Article 246 (3) read with Entry 54 of List II to make a law with respect to taxes on sales or purchases of goods, the different State Legislatures, as already mentioned, considered themselves free to make a law imposing tax on sales or purchases of goods provided they had some territorial nexus with such sales or purchases, *e.g.*, that one or other of the ingredients or events which go to make up a sale or purchase was found to exist or had happened within their respective territories. Whether they were right or wrong in so acting is a question which has not been finally decided by the Courts but the fact is that they did so. This resulted in multiple taxation which manifestly prejudiced the interests of the ultimate consumers and also hampered the free flow of inter-State trade or commerce. So the Constitution-makers had to cure that mischief. The first thing that they did was to take away the States' taxing power with respect to sales or purchases which took place outside their respective territories. This they did by clause (1) (*a*). If the matter had been left there, the solution would have been imperfect, for then the question as to which sale or purchase takes place outside a State would yet have remained open. So the Constitution-makers had to explain what an outside sale was and this they did by the Explanation set forth in clause (1). The language employed in framing the Explanation, however, has given scope for argument to counsel and presented considerable difficulties to the Court in ascertaining its purpose and intendment. If the Explanation simply said "For the purposes of sub-clause (*a*), a sale or purchase shall be deemed to have taken place outside a State when the goods have actually been delivered for the purpose of consumption in another State, notwithstanding the fact, etc., etc., then none of the difficulties would have arisen at all. But why, it is asked, did the Constitution-makers seek to explain what was an outside sale or purchase by saying that a sale or purchase was to be deemed to take place inside the parti-

cular State mentioned in the Explanation? Was the purpose of the Explanation only to explain what was an outside sale or purchase or was it also its purpose to allot or assign a particular class of sales or purchases of the kind mentioned therein to a particular State so as to put the question of situs of the sales or purchases of that description beyond the pale of controversy? These are questions which arise and are raised because of the somewhat involved language of the Explanation. Four different views as to the true meaning and effect of the Explanation have been suggested for our consideration and arguments have been advanced for and against the correctness of each of them. In the view we have taken, it is not necessary for us to express any final opinion in the matter. We propose accordingly to note the possible views and record very briefly the criticisms relating to each of those views and the suggested answers to such criticisms.

One view which has been called the strict view is this. In clause (1) (*a*) the Constitution-makers have placed a ban on the taxing power of the States with respect to sales or purchases which take place outside the State. If the matter had been left there the ban would have been imperfect, for the argument would have still remained as to where a particular sale or purchase took place. Does a sale or purchase take place at the place where the contract of sale is made, or where the property in the goods passes or where the goods are delivered? These questions are answered by the Explanation. That Explanation is "for the purposes of sub-clause (*a*)" *i.e.* for the purpose of explaining which sale or purchase is to be regarded as having taken place outside a State. By saying that a particular sale or purchase is to be deemed to take place in a particular State the Explanation only indicates that such sale or purchase has taken place outside all other States. The Explanation is neither an Exception nor a Proviso but only explains what is an outside sale referred to in sub-clause (*a*). This it does by creating a fiction. That fiction is only for the purposes of sub-clause (*a*) and cannot be extended to any other purpose. It should be limited to its avowed purpose. To say that this Explanation confers legislative power on what for the sake of brevity has been called the delivery State is to use it for a collateral purpose which is not permissible. Further, it is utterly illogical and untenable to say that Article 286 which was introduced in the Constitution to place *restrictions* on the legislative powers of the States, by a side-wind, as it were, gave enlarged legislative powers to the State of delivery by an explanation sandwiched between two *restrictions*. This construction runs counter to the entire scheme of the Article and the Explanation and one may see no justification for imputing such indirect and oblique purpose to this Article. Had the Constitution-makers so desired they could have done so in a more direct and straightforward way. To hold that the Explanation has, besides its declared purpose, another hidden purpose of conferring or enlarging legislative power is to build up a fanciful argument merely on the unfelicitous and involved language used in the Explanation although it is distinctly not the purpose of the Explanation and although it does not purport substantively and *proprio vigore*, to confer any legislative power on any State. Its only purpose is to explain what an outside sale is, so that, by one stroke, as it were, it takes away the taxing power, in respect of sales or purchases of the kind referred to in the Explanation, of all States other than the State where such sales or purchases are, by the Explanation, to be deemed to have taken place. This view of the Explanation was taken in the dissenting judgment in the case of the *State of Travancore-Cochin* v. *Shanmugha Vilas Cashew Nut Factory*[1]. The view that the Explanation is only for the purposes of sub-clause (*a*) of clause (1) and cannot be carried

1. (1954) 5 S.C.R. 53: (1953) S.C.J. 471: (1953) 2 M.L.J. 123 (S.C.).

over to clause (2) was also taken in the dissenting judgment in the *State of Bombay* v. *The United Motors* (*India*), *Limited*.[1]

The criticism that has been levelled against this strict view of the Explanation is that it will not entirely eliminate the claims of the States to tax sales or purchases on the basis of the nexus theory. Suppose, it is said, Parliament lifts the ban placed on inter-State trade or commerce by clause (2), all States will, in that situation, claim the right to tax sales or purchase if any one of the ingredients or events making up the sale is to be found to exist or to have happened in that State. It has been suggested in reply to this criticism that this apprehension is not at all well-founded. When Parliament will lift the ban imposed by clause (2), Explanation will continue to operate, so that inter-State sales or purchases falling within it will still be deemed to have taken place in the delivery State and, therefore, outside all other States none of which latter States will, by reason of the ban imposed by clause (1) (*a*), be entitled to tax sale. The ban under clause (2) being lifted the delivery State will become free to tax such sales or purchases in exercise of the taxing power conferred on it by Article 246 (3) read with Entry 54 in List II. Then, it is asked, what will happen to those sales or purchases which do not fall within the Explanation? After Parliament lifts the ban under clause (2) which State will tax sales or purchases in which goods are actually delivered in a particular State, not for consumption in that State but, say, for re-export to another State for consumption? One of the suggested answers was that those sales or purchases were not likely to be numerous, for ordinarily a dealer would not actually get the goods imported into a State only for re-exporting the same to another State for consumption in the last mentioned State but would find it more convenient and economical to arrange for the delivery of the goods straight to the last mentioned State. A further suggestion was that it might well be that when Parliament would by law lift the ban of clause (2) it would, by the same law, provide which of the States would tax such inter-State sales or purchases which were not covered by the Explanation and on what basis. This suggested answer, in its turn, raises a question as to the scope and ambit of the legislative power conferred on Parliament by clause (2). The opening words of clause (2), namely "Except *in so far as* Parliament may by law otherwise provide" clearly indicate that the lifting of the ban may be total or partial, that is to say, Parliament may lift the ban wholly and unconditionally or it may lift it to such extent as it may think fit to do and on such terms as it pleases. It is to be remembered that under Entry 42 of List I Parliament alone may make law with respect to inter-State trade or commerce. It is, therefore, conceded that in exercise of its legislative powers under that entry read with Article 286 (2) Parliament may make a law permitting the States to tax inter-State sales or purchases of certain commodities only. It is also not questioned that Parliament may, by way of regulating inter-State trade or commerce, fix a ceiling rate of tax on sales or purchases of goods which the law made by the States under Entry 54 of List II, may not exceed. Can Parliament also override the Explanation? If not, cannot Parliament at least provide which of the States may tax inter-State sales or purchases of goods which do not fall within the Explanation? These are some of the questions which may arise as and when Parliament will choose to make a law in exercise of the powers conferred on it and it will then be time enough to discuss and decide those questions. It is not for the Courts to advise Parliament in advance as to the scope of its legislative competency under clause (2) and, therefore, we only note those questions and leave them here.

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1. (1953) 4 S.C.R. 1069 at p. 1103 : (1953) S.C.J. 373 : (1953) 1 M.L.J. 743 (S.C.).

The second view as to the meaning and effect of the Explanation is that it once for all fixes the situs of a sale or purchase so that one knows when such a sale or purchase is outside a State and when it is inside a State. To put it differently, States are told when a sale or purchase is inside a particular State and, therefore, the States are also told when a sale or purchase is outside a State. In short the Explanation not only explains what is an outside sale or purchase but also actually fixes the situs of a sale or purchase in a particular State. This view of the Explanation was taken in the majority decision in the *State of Bombay* v. *The United Motors (India) Ltd.*[1] The majority decision quite clearly concedes that the Explanation does not, by itself, confer any legislative power on any State, not even the delivery State, with respect to sales or purchases of the kind mentioned therein but as it fixes the situs of such sales or purchases in the delivery State that State is left free to tax them in exercise of its legislative powers under Article 246 (3) read with Entry 54 of List II. The criticism offered against this view is, first of all, that it uses the Explanation for a purpose which is beyond that of sub-clause (*a*). This view turns the fiction created expressly for sub-clause (*a*) into a reality fixing the location of such sales and purchases for all purposes. In the next place this view ignores the existence of clause (2) which imposes a different ban on the legislative power of all States including the delivery State also that as long as Parliament does not lift the ban no State, not even the delivery State, may tax sales or purchases which take place in the course of inter-State trade or commerce, even though they may fall within the Explanation. The further objection is that this view also does not completely eliminate the confusion arising from the nexus theory. Suppose Parliament lifts the ban under clause (2), which State will tax sales or purchases which do not come within the Explanation? The same answer was suggested as was done in reply to similar objections to the first view. That, as we have said, will call for decision if and when Parliament exercises its legislative powers under clause (2).

The third view, which was adumbrated and discussed in the separate judgment of Bhagwati, J. in the case of The State of Bombay v. The United Motors (India) Ltd.,[1] is that the Explanation concerns itself with notionally fixing the situs of sales or purchases in the delivery State only but in no way affects the taxing power of the State in which, under the general law relating to the sale of goods, the property in the goods has passed. The result of this view is said to be that the State in which the sales or purchases are to be deemed to have taken place may tax them but the State in which, under the general law relating to the sale of goods, the property in the goods has passed may also tax them if and when Parliament lifts the ban of clause (2). This view, it is said, is open to all the criticisms to which the second view is subject and in addition to that a further objection has been suggested against this view, namely, that it will perpetuate double, if not multiple, taxation on one and the same transaction of sale or purchase at least after Parliament lifts the ban.

A fourth view has also been suggested before us as a possible view although it was not put forward on the previous occasion. It is founded on the non-obstante clause in the Explanation. It is said that clause (1) (a) and the Explanation concern themselves with only two States, namely the title State, i.e., the State in which, under the general law, title to the goods passes to the purchaser and the delivery State, i.e., the State in which goods are actually delivered as a direct result of the sale or purchase for consump-

1. (1953) 4 S.C.R. 1069: (1953) S.C.J. 373: (1953) 1 M.L.J. 743 (S.C.).

tion in that State. The purpose of the Explanation is said to be to demarcate the taking power of only these two States by taking out the sales or purchases of the kind mentioned therein from the sphere of the taxing power of the title State and subjecting them to the taxing power of the delivery State. In the juxtaposition of those two States clause (1) (a) read with the Explanation provides that the title State cannot tax because such sales or purchases are, by the fiction, made to take place outside its territory and that the delivery State can tax because the sales or purchases in question are, by the fiction, made to take place inside its territory. In short, the result of clause (1) (a) read with the Explanation, according to this view, is that the State which cannot tax such sales or purchases on the ground that they have taken place outside its territory is only that State in which the property in the goods has passed. The criticism is immediately put forward that if clause (1) (a) and the Explanation are limited in their operation only to the two States mentioned above then the other States which also claimed to tax on the strength of the nexus theory, e.g., the State where the contract was made, or the State where the goods were produced or manufactured or were found will be outside the ban and the mischief of multiple taxation which the Constitution-makers were out to curb will continue to be rampant and unabated. This view is also subjected to some of the other criticisms mentioned in connection with the other views of the Explanation.

As we have already stated, we do not desire, on this occasion, to express any opinion on the validity claimed for or the infirmities imputed to any of these several views, for, in our opinion, it is not necessary to do so for disposing of this appeal. Whichever view is taken of the Explanation it should be limited to the purpose the Constitution-makers had in view when they incorporated it in clause (1). It is quite obvious that it created a legal fiction. Legal fictions are created only for some definite purpose. Here the avowed purpose of the Explanation is to explain what an outside sale referred to in sub-clause (a) is. The judicial decisions referred to in the dissenting judgment in The State of Travancore-Cochin v. Shanmugha Vilas Cashew Nut Factory,[1] and the case of East End Dwellings Co. Ltd. v. Finsbury Borough Council,[2] clearly indicate that a legal fiction is to be limited to the purpose for which it was created and should not be extended beyond that legitimate field. It should further be remembered that the dominant, if not the sole, purpose of Article 286 is to place restrictions on the legislative powers of the States, subject to certain conditions in some cases and with that end in view Article 286 imposes several bans on the taxing power of the States in relation to sales or purchases viewed from different angles and according to their different aspects. In some cases the ban is absolute as, for example, with regard to outside sales covered by clause (1) (a) read with the Explanation, or with regard to imports and exports covered by clause (1) (b) and in some cases it is conditional, e.g., in the cases of inter-State sales or purchases under clause (2) which is, in terms, made subject to the proviso thereto and also to the power of Parliament to lift the ban. Again, in some cases the bans may overlap but nevertheless, they are distinct and independent of each other. The operative provisions of the several parts of Article 286, namely, clause (1) (a), clause (1) (b), clause (2) and clause (3) are manifestly intended to deal with different topics and, therefore, one cannot be projected or read into another. On a careful and anxious consideration of the matter in the light of the fresh arguments advanced and discussions held on the present occasion we are definitely of the opinion that the Expla-

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1. (1954) 5 S.C.R. 53 at pp. 81-82 : (1953) S.C.J. 471 : (1953) 2 M.L.J. 123 (S.C.).

2. L.R. (1952) A.C. 109 at p. 132.

nation in clause (1) (a) cannot be legitimately extended to clause (2) either as an exception or as a proviso thereto or read as curtailing or limiting the ambit of clause (2). Indeed, in The State of Bombay v. The United Motors (India) Ltd.[1] at pp. 1083-1084 and again at p. 1086 the majority judgment also accepted the position that the Explanation was not an exception or proviso either to clause (1) (a) or to clause (2). If, therefore, the Explanation cannot be read into clause (2) because of the express language of the Explanation and also because of the difference in the subject-matter of the operative provisions of the two clauses, then it must follow that, except in so far as Parliament may by law provide otherwise, no State law can impose or authorise the imposition of any tax on sales or purchases when such sales or purchases take place in the course of inter-State trade or commerce and irrespective of whether such sales or purchases do or do not fall within the Explanation. It is not necessary, for the purposes of this appeal, to enter upon a discussion as to what is exactly meant by inter-State trade or commerce or by the phrase "in the course of", for it is common ground that the sales or purchases made by the appellant company which are sought to be taxed by the State of Bihar actually took place in the course of inter-State trade or commerce. Parliament not having by law otherwise provided, no State law can, therefore, tax these sales or purchases, that is to say, Bihar cannot tax by reason of clause (2) although they fall within the Explanation and other States cannot tax by reason of both clause (1) (a) read with the Explanation and clause (2). This conclusion leads us now to consider the arguments by which the respondent State and the intervening States which support the respondent State seek to get over this position.

In the forefront is placed the argument that found favour with the majority of the Bench which decided the case of The State of Bombay v. The United Motors (India) Ltd.[1] That argument is to be found in the majority judgment at pp. 1085-1086. Shortly put, the majority opinion was that the operation of clause (2) stood excluded as a result of the legal fiction enacted in the Explanation. In their view the effect of the Explanation in regard to inter-State dealings was to invest what, in truth, was an inter-State transaction with an intra-State character in relation to the State of delivery and clause (2) could, therefore, have no application. They recognised that the legal fiction was to operate "for the purposes of sub-clause (a) of clause (1)" and that meant merely that the Explanation was designed to explain the meaning of the expression "Outside the State" in clause (1) (a). They, nevertheless, came to the conclusion that when once it was determined with the aid of the fictional test that a particular sale or purchase had taken place within the taxing State, it followed as a corollary, that the transaction lost its intra-State character and fell outside the purview of clause (2), not because the fiction created by the Explanation was used for the purpose of clause (2), but because such sale or purchase became, in the eye of the law, a purely local transaction. In his own inimitable language the learned Chief Justice, who wrote and delivered the majority judgment, concluded the discussion on this point by saying that the statutory fiction completely masked the intra-State character of the sale or purchase which, as a collateral result of such masking, fell outside the scope of clause (2). In spite of the great respect we always entertain for the opinions of the then learned Chief Justice and the other learned Judges who constituted the majority we are unable to accept the aforesaid arguments or the conclusions as correct for the reasons we now proceed to state.

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1. (1953) S.C.J. 373 : (1953) 1 M.L.J. 743 : (1953) 4 S.C.R. 1069 (S.C.).

The situs of an intangible concept like a sale can only be fixed notionally by the application of artificial rules invented either by Judges as part of the judge-made law of the land, or by some legislative authority. But as far as we know, no fixed rule of universal application has yet been definitely and finally evolved for determining this for all purposes. There are many conflicting theories: One, which is more popular and frequently put forward and is referred to and may, indeed, be urged to have been adopted by the Constitution in the non-obstante clause of the Explanation, favours the place where the property in the goods passes, another which is said to be the American view and which was adopted in G. Govindarajulu Naidu & Co. v. The State of Madras,[1] fixes upon the place where the contract is concluded, a third which prevails in the continental countries of Europe prefers the place where the goods sold are actually delivered, a fourth points to the place where the essential ingredients which go to make up a sale are most densely grouped. In this situation if the Explanation were not there and the ban under clause (2) were to be raised unconditionally it would become necessary for the Courts to reach a conclusion and choose between these conflicting views. Article 286 (1) (a), it should be noted, does not say that an inside sale may be taxed. It only says that no outside sale shall be taxed. Now if a State claims that the sale is inside because part of its ingredients lies within its boundaries, by the same logic it is also an outside sale because the remaining parts are outside its territories and if it is an outside sale it cannot be taxed whether or not it can be deemed to be inside for some particular purpose. The prohibition of Article 286 (1) (a) is against taxing an outside sale and if the sale is outside even partially it may well be argued that no State legislature can override the Constitution by deeming it to be an inside sale. Therefore, if the last of the aforesaid theories were to be adopted, then either no State would be able to tax, or all having the requisite nexus would be able to do so. But this, in our opinion, is the very mischief which the Constitution-makers wished to avoid and that, as we understand the majority judgment in the Bombay case, was their view also. So that view can be placed on one side. On any one of the other views the situs would have to be fixed artificially in one place and then one would have to apply the logic of the majority decision and hold that as soon as the situs is determined to be in one place by judicial fiction, i.e., a fiction enunciated by judicial decision, the inter-State character of the transaction must cease. The majority hold that this is the result when the situs is placed in only one State, namely, the delivery State, because of the fiction which the Explanation creates. The same result would have to follow logically if the situs were to be established by judicial fiction instead of by a constitutional one. The reasoning of the majority, pushed to its logical conclusion, will inevitably lead us to hold that all inter-State transactions must eventually be converted into intra-State transactions and, therefore, become amenable to the taxing power of the State within whose territories they are, by the constitutional or judicial fiction, to be deemed to take place. In this view there will remain no inter-State transaction on which clause (2) may possibly operate. The argument which leads to this astounding conclusion has only to be stated to be rejected. The truth is that what is an inter-State sale or purchase continues to be so irrespective of the State where the sale is to be located either under the general law when it is finally determined what the general law is or by the fiction created by the Explanation. The situs of a sale or purchase is wholly irrelevant as regards its inter-State character. We find no cogent reason in support of the argument that a

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1. (1952) 2 M.L.J. 614 : A.I.R. 1953 Mad. 116.

fiction created for certain definitely expressed purposes, namely, the purposes of clause (1) (a) can legitimately be used for the entirely foreign and collateral purpose of destroying the inter-State character of the transaction and converting it into an intra-State sale or purchase. Such metamorphosis appears to us to be beyond the purpose and purview of clause (1) (a) and the Explanation thereto. When we apply a fiction all we do is to assume that the situation created by the fiction is true. Therefore, the same consequences must flow from the fiction as would have flown had the facts supposed to be true been the actual facts from the start. Now, even when the situs of a sale or purchase is in fact inside a State, with no essential ingredient taking place outside, nevertheless, if it takes place in the course of inter-State trade or commerce, it will be hit by clause (2). If the sales or purchases are in the course of inter-State trade or commerce the stream of inter-State trade or commerce will catch up in its vortex all such sales or purchases which take place in its course wherever the situs of the sales or purchases may be. All that the Explanation does is to shift the situs from point A in the stream to point X also in the stream. It does not lift the sales or purchases out of the stream in those cases where they form part of the stream. The shifting of the situs of a sale or purchase from its actual situs under the general law to a fictional situs under the Explanation takes the sale or purchase out of the taxing power of all States other than the State where the situs is fictionally fixed. That is all that clause (1) (a) and the Explanation do. Whether the delivery State will be entitled to tax such a sale or purchase will depend on the other provisions of the Constitution. The assignment of a fictional situs to a sale or purchase has no bearing or effect on the other aspects of the sale or purchase, e.g., its inter-State character or its export or import character which are entirely different topics. This fixing of a situs for a sale or purchase in any particular State either under the general law or under the fiction does not conclude the matter. It has yet to be ascertained whether that sale or purchase which by virtue of the Explanation has taken place in the delivery State was made in the course of inter-State trade or commerce. For this purpose the Explanation can have no relevancy or application at all.

Another argument adumbrated in the majority judgment in The State of Bombay v. The United Motors (India) Ltd., at p. 1081 and at pp. 1086-1087 and elaborated before us is that just as the freedom of trade referred to in Article 301 has been made to give way to the States' power of imposing non-discriminatory taxes by Article 304 so must Article 286 (2) be regarded as subject to the States' taxing power, for the protection of Article 286 (2) could not have been intended to be larger. This argument was refuted by the dissenting judgment in that Bombay case (supra) at pp. 1102-1103 and p. 1127 and also by the dissenting judgment in The State of Travancore-Cochin v. Shanmugha Vilas Cashew Nut Factory,[2] at p. 89. Nothing that we have heard on the present occasion induces us to depart from the views expressed on this subject in those dissenting judgments.

It is next urged that the Explanation in effect operates as an exception or a proviso to clause (2). This view runs directly counter to the express language of the Explanation itself. So the argument is formulated in a slightly different way. It is said that clause (2) contains the enunciation of the general rule and the Explanation embodies a particular or special rule. According to a cardinal rule of construction the particular or special rule must control or cut down the general rule. This view was adopted by the High Court in the judgment under appeal and also found favour with one of

1. (1953) S.C.J. 373 : (1953) 1 M.L.J. 743 : (1953) 4 S.C.R. 1069 (S.C.).

2. (1954) 5 S.C.R. 53 : (1953) S.C.J. 471 : (1953) 2 M.L.J. 123 (S.C.).

the Judges in the Bombay case.[1] It appears to us that this argument overlooks the basic fact that clause (1) (a) to which is appended the Explanation and clause (2) deal with different topics altogether. The Explanation is concerned with explaining what is an outside sale or purchase by fixing a fictional situs. It cannot be read as a provision independent of clause (1) (a). It does not, by itself and in terms, confer any legislative power on any State. It is true that the Explanation may apply to fix the situs of many inter-State transactions but that is only for ascertaining, for the purposes of clause (1) (a), whether it has taken place inside or outside a particular State. The inter-State aspect of the sales or purchases is not within the purview of clause (1) (a) which looks at sales or purchases from the point of view of their location only. Clause (2), on the other hand, takes note of the inter-State character of sales or purchases which is an entirely different topic. The two provisions do not relate to the same subject and, therefore, it is not possible to hold that one is the enunciation of a general rule and the other the enunciation of a particular or special rule on one and the same subject. The principle of construction relied upon cannot, in our opinion, be called in aid in construing clause (2) and the Explanation of clause (1) (a). If the Explanation cuts down clause (2), it must also, on a parity of reasoning, cut down clause (3) which, as will hereinafter be explained more fully, could not possibly have been intended by the Constitution-makers. It must also cut down clause (1) (b) dealing with import and export; but to hold that would run counter to the decision in State of Travancore-Cochin and others v. The Bombay Co. Ltd.[2] In our opinion to use the Explanation to cut down the operation of clause (2) or clause (3) will be to use it for a purpose other than its legitimate and avowed purpose.

The same argument is put in a slightly different way and in a more attractive form. It is said that we must construe Article 286 as a whole and give meaning to every part of it. Sales or purchases which fall within the Explanation to clause (1) (a) clearly partake of the character of inter-State transactions. Therefore, if we construe clause (2) of Article 286 literally and strictly then the whole of clause (1) (a) and the Explanation will be redundant and useless and will have no immediate operation and will remain a dead letter, at any rate, until Parliament, in exercise of its powers under clause (2), lifts the ban. We must, it is urged, make an attempt to avoid such a result and adopt such a construction as will not only give effect to each part of the Article but also make each part applicable in presenti. That, it is pointed out, can well be done if clause (2) is interpreted in a restricted manner. The argument runs—give full and immediate effect to the Explanation and then leave clause (2) to govern or operate on cases which do not fall within the Explanation. In effect this argument means that we must treat all transactions of sales or purchases falling within the Explanation as outside clause (2). Shorn of its thin veneer of disguise this argument is nothing more than the argument that the Explanation, in effect, operates as an exception to clause (2) and all the criticisms applicable to that construction will apply mutatis mutandis to the argument in the present form. Apart from that there are obvious fallacies which render the argument utterly unacceptable. We now proceed to deal with these fallacies seriatim:

(i) In the first place, the mere circumstance that a provision in the Constitution will, on a proper construction, take effect on the happening of a future event can, by itself, be no ground for not giving effect to the plain language of that provision. Take the very next provision in Article 286 it-

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1. (1953) S.C.J. 373 : (1953) 1 M.L.J. 743 : (1953) 4 S.C.R. 1069 (S.C.).

2. (1952) 3 S.C.R. 1112 : (1952) S.C.J. 527 : (1953) 1 M.L.J. 1 (S.C.).

self, namely clause (3). It has no present application and its usefulness will ensue only when Parliament by law declares certain goods to be essential for the life of the community. The fact that the Explanation, in so far as it relates to inter-State sales, may not have an immediate operation until Parliament lifts the ban under clause (2) need not unnecessarily oppress us or lead us to adopt a forced construction only to give the whole of it an immediate and present operation.

(ii) In the second place, it is not correct to say that the Explanation construed as suggested above, can have no immediate operation at all. It certainly has immediate operation to render sales and purchases which fall within the Explanation to be outside sales and purchases so as immediately to take away the taxing power of all States other than the delivery State with respect to them. Further cases may arise in which purchases or sales which are outside clause (2) may, nevertheless, fall within and be immediately governed by the Explanation. We do not wish to express any opinion on hypothetical cases but the following illustration will show that on a given view of the law the Explanation would be called into play despite the fact that clause (2) was not attracted. Take, for instance, a case where both the seller and the buyer reside and carry on business in Gurgaon in the State of Punjab. Let us say that the seller has a godown in the State of Delhi where his goods are stored and that the buyer has also a retail shop at Connaught Circus also in the State of Delhi. The buyer and the seller enter into a contract at Gurgaon for the sale of certain goods and a term of the contract is that the goods contracted to be sold will be actually delivered from the seller's godown to the buyer's retail shop, both in the State of Delhi, for consumption in the State of Delhi. Pursuant to this contract made in Gurgaon in the State of Punjab, the buyer pays the full price of the goods at Gurgaon and the seller hands over to the buyer also at Gurgaon a delivery order addressed to the seller's godown-keeper in Delhi to deliver the goods to the buyer's retail shop. As a direct result of this sale the seller's godown-keeper, on the presentation of this delivery order, actually delivers the goods to the buyer's retail shop at Connaught Circus for consumption in the State of Delhi. On one view of the law, the situs of such a sale would be Gurgaon. We need not decide that it is, because that type of case is not before us and there may be other views to consider, but it is certainly a possible view. It is also possible to hold that this is not inter-State trade or commerce, because there is no movement of goods across a State boundary. Again, we need not decide that because that also may be controversial. But given these two postulates the transaction would fall squarely within the Explanation and yet it would not come within clause (2), for there is no movement of the goods across the border of any State and both the seller and the buyer are in the same place. Surely, the Explanation will, in presenti, govern such cases irrespective of whether Parliament has lifted the ban under clause (2). If these postulates are accepted then by virtue of clause (1) (a) read with the Explanation the State of Delhi alone will be entitled to impose a tax on such a sale or purchase and the State of Punjab will be precluded from doing so by reason of the fictional situs assigned to such a sale or purchase by the Explanation, although the contract was made, price was paid and symbolical or constructive delivery of the goods by the handing over of the delivery order took place in Gurgaon in the State of Punjab.

(iii) It is not correct to say that clause (1) (a) read with the Explanation is wholly useless. It may well be argued that there was scope for the operation of clause (1) (a) and the Explanation as and when the President exercised the powers vested in him by the Proviso to clause (2).

It will be noticed that under that proviso the President's order was to take effect "notwithstanding that the imposition of such tax is contrary to the provisions of this clause". This non obstante clause does not, in terms, supersede clause (1) at all and, therefore, prima facie, the President's order was subject to the prohibition of clause (1) (a) read with the Explanation. It is, however, pointed out that the proviso says that any tax which was being lawfully levied by the States immediately before the commencement of the Constitution will continue to be levied until the date therein specified. It is said that before the Constitution sales tax was levied by the different States on the basis of the nexus theory irrespective of the situs of the sales or purchases and, therefore, this very proviso clealy indicates that the intention of the Constitution-makers was that all taxes imposed on the basis of the nexus theory must continue irrespective of the provisions of the Explanation which fictionally fixes the situs of the sales or purchases in the delivery State. The argument is not without some force but cannot prevail. It is true that the different States used to levy sales tax on the basis of slight nexus but the legality of them had not, at the date of the Constitution, been tested in a Court of law. Therefore, the proviso, authorised the President by order to continue only such of them as were being "lawfully" levied and consequently there is no reason to think that the President's order was intended to continue all sales taxes previously levied irrespective of their legality. In the next place, there is nothing to be surprised at if the President's order was made to operate subject to the prohibition of clause (1) (a) read with the Explanation. Finally, to accede to this argument must mean that we must read into the proviso something which is not there. To give effect to this argument we shall have to alter the non obstante clause towards the end of the proviso and substitute the words "of the foregoing clauses" for the words "of this clause". However, we need not rest our decision on this point. It will certainly operate as soon as Parliament, in exercise of the power vested in it by clause (2), lifts the ban imposed on the States. Upon the lifting of the ban by Parliament those inter-State sales or purchases which fall within the Explanation will, by virtue of it, be deemed to take place within the delivery State and such sales or purchases being, as a result of such fiction, outside all other States none of them will be entitled to tax such sales or purchases. Whether the delivery State will be entitled to make a law imposing tax on such sales or purchases in exercise of the legislative powers vested in it by Article 246 (3) read with Entry 54 in List II or whether Parliament, while lifting the ban, may also by the same law authorise the delivery State to do so or what is the extent of the authority vested in Parliament by the opening words of clause (2) are questions which will arise for consideration only after the ban under clause (2) is lifted and we need not in advance express any opinion on a future problem.

(iv) If we accept the argument that we are to give full effect to clause (1) (a) and the Explanation and let it operate immediately on all transactions which come within their terms and leave clause (2) to govern only those cases which are outside clause (1) (a) read with the Explanation then, on a parity of reasoning, we shall have to give effect to clause (1) (a) and the Explanation and leave clause (1) (b) and also clause (3) to govern only those cases which do not fall within clause (1) (a) read with the Explanation. To illustrate this point, take clause (3). Suppose under clause (3) Parliament by law declares certain goods, say wheat, to be essential for the life of the community. Suppose there is a sale of such essential goods by a seller in the State of Delhi to a buyer in Gurgaon in the State of Punjab in which as a direct result of such sale the goods are delivered in Gurgaon in

Punjab for consumption in that State. According to the argument we have to give full effect first to clause (1) (a) and the Explanation and accordingly we must hold that the transaction is wholly covered by the Explanation and, therefore, Punjab will be entitled to tax it and clause (3) must be left to govern only cases other than those which fall within the Explanation. If the argument were sound it must follow that the State of Punjab will be perfectly justified in saying that for the purpose of making a law imposing a tax on such sales or purchases its law need not be reserved for the assent of the President at all. It may well say that the restrictive requirements of reserving the bill for the President's assent and of obtaining such assent before the law may take effect apply only to a law which imposes tax on sales or purchases which are outside the Explanation. In other words, the State of Punjab, in our illustration, will be entitled to say that clause (3) governs only those cases of sales or purchases of essential goods which do not come within the description mentioned in the Explanation, namely, for instance, only those sales or purchases in which essential goods are delivered in a State not for consumption in that State but for re-export to another State. This will rob clause (3) of practically the best part of its content and, therefore, of its usefulness and defeat the very purpose the Constitution-makers obviously had of safeguarding sales or purchases of essential commodities by imposing the restriction requiring the reservation of the bill for the President's assent and the obtaining of such assent. When a famine is raging in say Punjab, and sales and purchases are made of wheat which is declared as essential to the life of the community and as a direct result of such sale wheat is delivered in the Punjab for consumption there the State of Punjab may, according to the reasoning underlying the argument, put up the price of these essential goods by imposing a sales tax by making a law to that effect and ignoring the safeguards prescribed by clause (3). An argument which leads us to a result so utterly absurd and untenable in reason cannot for a moment be countenanced.

No less than five reasons have been suggested in support of the argument that a restricted construction should be placed on clause (2) of Article 286. It will be convenient to deal with them at this stage one by one.

(a) In the first place, it is urged, that clause (2) should be construed in a restricted way because the class of sales falling within Article 286 (1) (a) forms a special class of inter-State sales and they cannot be affected by the general provisions of Article 286 (2). This argument totally overlooks the real scheme of Article 286. It fails to note that by this Article the Constitution-makers were imposing restrictions on the taxing power of the States with respect to sales or purchases in their different aspects viewed from entirely different angles which we have heretofore already explained. The subject-matters of the different parts of Article 286 are, therefore, different and distinct and the principle of interpretation, namely, the special provision cutting down the general provision cannot be properly invoked.

(b) The second reason urged is that if Article 286 (2) applies to the class of sales or purchases falling within Article 286 (1) (a) then it will result in discrimination against local trade and in favour of inter-State trade and this will be inconsistent with the provisions of Part XIII of the Constitution. It is said that when a Bihar dealer sells certain goods to a Bihar purchaser the former is obliged to pay sales tax which he passes on to the

Bihar purchaser but when the Bihar purchaser directly imports into Bihar similar goods from say a West Bengal dealer for consumption in Bihar that transaction will not be liable to Bihar Sales Tax as it will be an inter-State transaction. This, it is said, will prejudice the Bihar seller for all Bihar purchasers will then be driven to purchasing goods from out-of-State sellers and local producers will suffer a set back. The argument is that as a literal construction of clause (2) will result in such discrimination against local trade, the cardinal rule of interpretation, namely, reading the written provision literally and giving to the words their ordinary natural meaning should give way to a restricted construction. This argument overlooks several basic things. If there is any real hardship of the kind referred to, there is Parliament which is expressly invested with the power of lifting the ban under clause (2) either wholly or to the extent it thinks fit to do. Why should the Court be called upon to discard the cardinal rule of interpretation for mitigating a hardship, which after all may be entirely fanciful, when the Constitution itself has expressly provided for another authority more competent to evaluate the correct position to do the needful? This argument also fails to take into account the benefit which the consuming public derives from the free flow of goods from one State to another resulting in lower prices. Further, the argument overlooks the fact that the so-called hardship, if any, is brought about, not really by reason of the liberal construction of clause (2) but by reason of the State of Bihar imposing a Sales tax on an intra-State transaction. The State of Bihar is not obliged to levy a sales tax on sales or purchases of goods in respect of which there is competition between out-of-State producers, manufacturers and dealers and the Bihar producers, manufacturers and dealers and, indeed, if it intends to encourage its local manufacturers or producers it should not do so. It will not do for the State of Bihar to say that it must levy a Sales tax on intra-State sales or purchases which it is not obliged to do and at the same time that it must protect the Bihar dealers or producers and enable them to compete with outside dealers or producers and, therefore, ask us to construe the Constitution in an unnatural way so as to enable it to have the best of both worlds. It is immediately retorted that the welfare State must have sufficient revenue to run itself, that if it is to forego Sales tax its economy will be totally upset. This harrowing picture of economic collapse of the States has been pressed upon this Court on this as on the previous occasion and it evidently oppressed the minds of the Judges who were parties to the majority decision. It is, therefore, necessary to examine the matter a little more closely. Ordinarily, inter-State trade or commerce is done between a dealer in one State and a dealer in another State. The dealer in the consuming State in his turn sells the goods in retail to actual consumers. There can be no objection to insisting upon all inside dealers getting themselves registered and submitting returns showing goods imported and sold by them and bringing their annual turnovers to tax which they will pass on to the actual consumers. Call it a purchase tax vis-a-vis the earlier transaction under which the goods were delivered in Bihar for consumption in that State or call it a Sales tax vis-a-vis the subsequent local sales by the Bihar dealer to actual consumers in Bihar, the State will get the full revenue on these local sales or purchases from the local sellers. There can be no doubt that sales or purchases of this kind to or from one dealer to another dealer actually form the bulk of inter-State trade or commerce. To take them out of clause (2) will be to make the protection of inter-State trade or commerce wholly illusory and to rob clause (2) of the best part of its content and utility. Ordinarily individual local consumers buy goods in the local market and do not generally bring goods for their personal consumption from

outside dealers. It is only in exceptional cases that a local consumer will be energetic enough to bring goods from outside the State for his consumption and their number will be small. It is only those stray individual consumers who are energetic enough to get goods direct from a dealer in another State and may be willing to pay freight, etc., and undertake the risk of loss or damage who may evade the tax. The difficulty in tracing such stray actual local consumers cannot be any cogent reason for adopting the unnatural construction sought to be put upon clause (2) of Article 286. If big Bihar purchasers, e.g., Tata Iron & Steel Co. Ltd., who are very heavy consumers of coal, prefer to get their supply of coal from Raniguunge coal-fields in West Bengal for consumption in their large factories at Tatanagar in Bihar to getting their supplies from the Jharia coal-fields in Bihar and thereby evade sales tax to the detriment of the revenues of the State of Bihar, then again there is Parliament to mitigate such hardship by making suitable laws in exercise of its power under Article 286 (2). Such supposed hardship is, in our view, no ground for putting a forced and unnatural interpretation upon Article 286.

(c) The third reason in support of a restricted construction of Article 286 (2) is thus fomulated: The purpose of Article 286 being to eliminate multiple taxation and Article 286 (1) (a) having already achieved that purpose with regard to the class falling within the Explanation, it was no longer necessary for that purpose to apply Article 286 (2) to that class. This reasoning appears to us to be untenable. It overlooks the patent fact that the different parts of the Article look upon sales and purchases from different perspectives and place different bans on the taxing power of the States at different angles. The circumstance that the bans may in given cases overlap is no justification for concluding that the subject-matter of the different provisions is the same. This line of reasoning assumes that the only purpose of Article 286 is to eliminate multiple taxation. The purposes of the different parts of the Article have to be ascertained from the language of the Article itself read in the light of the contemporary history of the legislative activities of the different States with respect to taxes on sales or purchases of goods and the chaos and confusion that arose and the havoc that ensued as a result of those activities. There was multiple taxation which imposed a heavy burden on the consumers and which was also calculated to impede and hinder the free flow of inter-State trade or commerce. The Constitution-makers, therefore, imposed several bans on the taxing power of the States with respect to sales or purchases, namely, first on the basis of their situs, secondly and thirdly on the basis of the character of the transactions, e.g., foreign trade or inter-State trade and fourthly on the basis of the nature or quality of the goods sold or purchased, i.e., whether they have been declared to be essential to the life of the community. As regards inter-State trade or commerce the clear intention of the Constitution-makers was to place an absolute ban for the time being, subject to the proviso, and to give some time to Parliament to study the situation and to evaluate the result of the ban and to lift the ban to such extent as it thought fit in the interest of the general public and that of inter-State trade or commerce. If the matter is approached in this way it becomes abundantly clear that this part of the argument we are now considering proceeds on a wrong assumption of the purpose of the Constitution.

(d) A restricted construction of Article 286 (2) is said to be necessary and called for because the Constitution itself has divided inter-State sales or purchases into two categories and in regard to one class it has itself provided both as to which State will tax them and under what condition and in regard to the other class the Constitution has imposed a ban in general terms and granted power to Parliament in general terms to relax such ban as Parlia-

ment thinks fit. This is clearly begging the question and does not require any elaborate refutation.

(e) Another string to the bow is that because of the legal fiction created by the Explanation the inter-State sales or purchases were converted into intra-State transactions. This, it will be recalled, was the reasoning adopted in the majority decision in The State of Bombay v. The United Motors (India) Ltd.[1] We are unable to accept this argument for the reasons given above which need not be repeated here.

It is said that the picture of harassment and inconvenience to the traders referred to in the dissenting judgments is more imaginary than real. It is pointed out that it is only big traders who will have sales of their goods in all the States in the Union of India. Those big traders maintain a large staff of clerks and accountants and there can be no difficulty if they are obliged to file returns in each State where they sell their goods. This argument overlooks the practical effects of the different sales tax laws enacted by different States. All big traders will have to get themselves registered in each State, study the sales-tax Acts of each State, conform to the requirements of all State laws which are by no means uniform and finally may be simultaneously called upon to produce their books of account in support of their returns before the officers of each State. Anybody who has any practical experience of the working of sales-tax laws of the different States knows how long books are detained by the officers of each State during assessment proceedings. There are different stages of these proceedings, original, appellate and revisional and there will be as many proceedings under each heading as there are States where the goods are sold. The harassment to traders is quite obvious and needs no exaggeration. On the other hand if any risk to the economy of the States ensues from the construction of Article 286 which commends itself to us, the appeal must be to Parliament which can by law made under the opening words of clause (2) mitigate that risk.

For all the foregoing reasons we are definitely of opinion that, until Parliament by law made in exercise of the powers vested in it by clause (2) provides otherwise, no State can impose or authorise the imposition of any tax on sales or purchases of goods when such sales or purchases take place in the course of inter-State trade or commerce and the majority decision in The State of Bombay v. The United Motors (India) Ltd.[1] in so far as it decides to the contrary cannot be accepted as well founded on principle or authority.

In the view we have taken on question (a) it is not necessary for us, on this occasion, to discuss the other questions (b), (c) or (d). All that remains to be seen is whether as a result of our finding on question (A) the Bihar Sales Tax Act, 1947 is ultra vires and void in its entirety or it is only bad in so far as it seeks to impose a sales tax on out-of-State sellers in respect of inter-State sales or purchases. This will depend on whether the obejctionable parts of the Act are severable from the rest of its provisions. It will be necessary here to refer to a few provisions of the Act.

The long title of the Act is: "An Act to provide for the levy of a tax on sales of goods in Bihar". The preamble recites that "It is necessary to make an addition to the revenues of Bihar and for that purpose to impose a tax on the sale of goods in Bihar". The Act extends to the whole of the State of Bihar. "Dealer" was originally defined in section 2 (c) as meaning:

"any person who sells or supplies any goods in Bihar whether for commission, remuneration or otherwise and includes any firm or a Hindu joint family and any society, club or association which sells or supplies goods to its members".

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1. (1953) S.C.J. 373 : (1953) 1 M.L.J. 743 : (1953) 4 S.C.R. 1069 (S.C.).

By the Bihar Finance Act, 1950, the words "in Bihar" were omitted from this definition. Clause (g) of the same section defines sale. That definition has undergone various changes from time to time. The period we are concerned with in this appeal, is from 26th January, 1950 to the 30th September, 1951. Between 1st October, 1948 and 31st March, 1951 which covers the earlier part of the relevant period the clause stood as follows:—

" 'Sale' means, with all its grammatical variations and cognate expressions, any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods involved in the execution of contract but does not include a mortgage, hypothecation, charge or pledge:

Provided that a transfer of goods on hire-purchase or other instalment system of payment shall, notwithstanding the fact that the seller retains a title to any goods as security for payment of the price, be deemed to be a sale:

Provided further that notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930 (III of 1930), the sale of any goods—

(i) which are actually in Bihar at the time when, in respect thereof, the contract of sale as defined in section 4 of that Act is made, or

(ii) which are produced or manufactured in Bihar by the producer or manufacturer thereof,

shall, wherever the delivery or contract of sale is made, be deemed for the purposes of this Act to have taken place in Bihar:

Provided further that the sale of goods in respect of a forward contract, whether goods under such contract are actually delivered or not, shall be deemed to have taken place on the date originally agreed upon for delivery"."

This definition was amended and between the 1st April, 1951 and the 31st March, 1952 which covers the latter part of the relevant period it read as follows:—

" 'Sale' means, with all its grammatical variations and cognate expressions, any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods involved in the execution of contract but does not include a mortgage, hypothecation, charge or pledge:

Provided that a transfer of goods on hire purchase or other instalment system of payment shall, notwithstanding the fact that the seller retains a title to any goods as security for payment of the price, be deemed to be a sale:

Provided further that the sale of goods in respect of a forward contract, whether goods under such contract are actually delivered or not, shall be deemed to have taken place on the date originally agreed upon for delivery.

Explanation.—The sale of any goods actually delivered in Bihar as a direct result of such sale for the purpose of consumption in Bihar shall be deemed for the purpose of this Act to have taken place in Bihar, notwithstanding the fact that under the general law relating to sale of goods, the property in the goods has, by reason of such sale, passed in another State".

It will be noted that the Explanation which is substantially a reproduction of the Explanation to Article 286 (1) (a) was introduced for the first time by this amendment.

"Turnover" is defined in section 2 (i). The charging section is section 4 which provides, amongst other things, that subject to the provisions of sections 5, 6, 7 and 8 and with effect from the commencement of the Act every dealer whose gross turnover during the year immediately preceding the date of such commencement on sales which have taken place both in and outside Bihar exceeds Rs. 10 000 shall be liable to pay tax under this Act on sales which have taken place in Bihar and from the date of such commencement. It will be noticed that although the long title and the preamble refer to the sale of goods in Bihar the words "in Bihar" were deleted from the definition of the word "sale" in section 2 (g). There are various provisions for working out the scheme of the Act to which no detailed reference

need be made. It may, however, be pointed out that a new section was inserted by the Adaptation of Laws (Third Amendment) Order, 1951, which substantially reproduced the provisions of Article 286 (1) and (2). Although, therefore, the charging section read with the definition of "dealer" and "sale" may be wide enough to cover inter-State sales, the new section 33* makes all those provisions subject to its provisions which are nothing but a reproduction of the corresponding provisions of Article 286. In view of the interpretation we have put upon Article 286 it must follow that the charging section of the Act read with the relevant definitions cannot operate to tax inter-State sales or purchases and it must be held that as Parliament has not otherwise provided, the Act, in so far as it purports to tax sales or purchases that take place in the course of inter-State trade or commerce, is unconstitutional, illegal and void. This being the position the question arises whether the Act is bad in toto or is bad only in so far as it offends the provisions of Article 286 as construed above. It appears to us that the Act imposes tax on subjects divisible in their nature but does not exclude in express terms subjects exempted by the Constitution. In such a situation the Act need not be declared wholly ultra vires and void, for it is feasible to separate taxes levied on authorised subjects from those levied on exempted subjects and to exclude the latter in the assessment of the tax. In these circumstances it is difficult to say that the scheme of taxing inter-State sales forms such an integral part of the entire scheme of taxation on sales or purchases of goods as to be inextricably inter-woven with it. There is no reason to presume that had the Bihar Legislature known that the provisions of the Act might be held bad in so far as they imposed or authorised the imposition of a tax on inter-State trade or commerce even though Parliament had not by law provided otherwise it would, nevertheless, not have passed the rest of the Act.

The result, therefore, is that this appeal must be allowed and we issue an order directing that, until Parliament by law provides otherwise, the State of Bihar do forbear and abstain from imposing sales-tax on out-of-State dealers in respect of sales or purchases that have taken place in the course of inter-State trade or commerce even though the goods have been delivered as a direct result of such sales or purchases for consumption in Bihar. The State must pay the costs of the appellant in this Court and in the Court below. The interveners must bear and pay their own costs.

(Subscribed to by *Vivian Bose* and *Jafer Imam, JJ.*).

Bhagwati, J.—I agree with the reasoning and the conclusions reached in the judgement just delivered by my Brother S.R. Das. In so far, however, as I was a party to the judgment in The State of Bombay and Another v. The United Motors (India) Ltd. and Others,[1] it is but proper that I should record my reasons for doing so.

The Appellant is a company incorporated under the Indian Companies Act having its registered office at No. 153, Dharamtala Street, Calcutta and laboratory and factory at Baranagore in the District of 24 Parganas in West Bengal and carrying on business of manufacturing and selling various sera, vaccines, biological products and medicines, etc., in Calcutta. The Appellant has extensive sales of its products throughout the whole of the Union of India and the goods are despatched by the Appellant from Calcutta by rail, steamer or air against orders accepted at Calcutta and all sales take place within the State of West Bengal. The Appellant has no offices, agents,

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1. (1953) 4 S.C.R. 1069 : (1953) S.C.J. 373 : (1953) 1 M.L.J. 743 (S.C.).

managers, godowns or laboratories in the State of Bihar. It is not a resident of Bihar nor has a place of business in Bihar and does not enter into any transaction of sale within the State of Bihar.

On the 24th October, 1951, the Assistant Superintendent of Commercial Taxes, headquarters Patna, wrote to the Appellant to get itself registered under the Bihar Sales Tax Act and to take necessary steps to deposit the Bihar sales-tax dues in any Bihar treasury at an early date, contending that all sales in West Bengal in which the goods had been delivered in the State of Bihar as a direct result of the sale for the purpose of consumption in Bihar were leviable to Bihar sales-tax with effect from the 26th January, 1950. The Appellant denied the right of the State of Bihar to tax the sales effected in West Bengal and by his letter, dated the 18th December, 1951, the Superintendent of Commercial Taxes, Central Circle, Bihar, sent a notice under Section 13 (5) of the Bihar Sales Tax Act to the Appellant calling upon it to apply for registration and to submit the return, showing its turnover for the period from the 26th January, 1950, to the 30th September, 1951.

Correspondence thereafter ensued in which both the parties made futile attempts to convince each other of the legality of the stand taken by it. The Appellant asserted that it was not liable to assessment under the Bihar Sales Tax Act and denied the authority of the State of Bihar to levy sales-tax upon the Appellant. The Assistant Superintendent of Commercial Taxes, Central Circle, Bihar, ultimately by his letter, dated the 28th May, 1952, rejected the contention of the Appellant and asked it to comply with the notice under Section 13 (5) of the Bihar Sales Tax Act failing which he threatened to proceed to take steps for assessment to the best of his judgment. The Appellant thereupon by its letter. dated the 7th June, 1952, called upon the Superintendent of Commercial Taxes, Central Circle, Bihar, to forthwith rescind and cancel the notice issued under Section 13 (5) of the Bihar Sales Tax Act as the said notice was ultra vires of the Constitution and, also the Bihar Sales Tax Act and was entirely illegal and inoperative.

As the aforesaid demand was not complied with the Appellant filed in the High Court of Judicature at Patna a petition under Article 226 of the Constitution asking for appropriate reliefs by way of issue of a writ of mandamus, certiorari and prohibition and any other appropriate writs or orders quashing the proceedings issued for the purpose of levying and realising a tax which was not lawfully leviable on the Appellant and asking the Appellant to file a return and register itself as a dealer. The State of Bihar, Respondent 1, The Superintendent of Commercial Taxes, Central Circle, Patna, Respondent 2 and Assistant Superintendent of Commercial Taxes, Central Circle, Bihar, Respondent 3, were the opposite parties to the petition. They did not file any affidavit in reply. The facts alleged by the Appellant were not denied but arguments on questions of law arising out of the petition were addressed by the Government Pleader appearing for them before the High Court. The High Court held:

"(1) That the Respondent 3 was acting within his jurisdiction in issuing the notice under Section 13 (5) and holding that the applicant was liable to pay the tax, that if he made an assessment under Section 13 (5) the Act provided a right of appeal whereby any error of law might be corrected by the Appellate authorities prescribed under the Act, that Sections 24 and 25 of the Act furnished a complete and effective machinery for appeal and revision against assessments made under the Act and that there was therefore no warrant for issuing a writ under Article 226 of the Constitution;

(2) That the phrase 'sale or purchase in the course of inter-State trade or commerce' in Article 286 (2) must be construed so as exclude the particular class of sales or purchases described in the Explanation to Article 286 (1) and that therefore the amended clauses (*c*) and (*g*) of Section 2 and Section 33 of the Bihar Sales Tax Act were not in conflict with Article 286 (2);

(3) That the Bihar Sales Tax Act was in pith and substance not a law with respect to sale of goods but a law imposing tax on the sale of goods and the legislation fell entirely within Item 34 of List II of the Seventh Schedule to the Constitution, *viz.*, taxes on the sale or purchase of goods other than newspapers and that the Act could not therefore be said to be invalid under Article 254;

(4) That the Bihar Sales Tax Act had been enacted for the purpose of imposing tax on the sale of goods and not for regulating inter-State or intra-State trade and commerce and that therefore the Act did not contravene in any way Article 304; and

(5) That the Act was also not invalid on the ground that it was extra-territorial in operation, that the jurisdiction to tax existed not only in regard to persons or property but also as regards the business done within the State, that it was not necessary for the purposes of jurisdiction that the entire transaction of sale should have taken place within the territories, that on the other hand the fact that the goods were delivered in Bihar for consumption constituted sufficient nexus or territorial connection which conferred jurisdiction upon the Bihar legislature to impose the tax and that the Explanation to Article 286 (1) (*a*) expressly conferred upon the State power to tax sales or purchases of goods which were actually delivered for consumption inside the State."

The High Court therefore dismissed the petition with costs.

The Appellant applied for leave to appeal to this Court and the High Court granted the requisite certificate under Article 132 (1) of the Constitution.

At the hearing of the appeal before us the State of West Bengal, Tata Iron & Steel Company, Calcutta, the State of Madras, the State of Mysore, the State of Uttar Pradesh, the State of Orissa, the State of Pepsu, the State of Rajasthan, the State of Madhya Pradesh, the State of Travancore-Cochin, the State of West Punjab and one M. K. Kuriakose applied for and were granted leave to intervene and counsel for the Interveners appeared before us and urged their respective points of view.

The first question as regards the maintainability of a petition for writ under Article 226 on the facts disclosed in the petition can be disposed of very shortly in the words of Mahajan, C. J., in Himmatlal Harilal Mehta v. The State of Madhya Pradesh & Others[1], where he repelled a similar contention urged by the Advocate-General of the State of Madhya Pradesh:—

"The learned Advocate-General of the State................however contended that on the principle enunciated by the Privy Council in *Raleigh Investment Co.* v. *The Governor-General-in-Council*,[2] jurisdiction to question assessment otherwise than by use of the machinery expressly provided by the Act, was inconsistent with the statutory obligation to pay, arising by virtue of the assessment and that the liability to pay the sales-tax under the Act is a special liability created by the Act itself which at the same time gives a special and particular remedy which ought to be resorted to, and therefore the remedy by a writ ought not to be allowed to be used for evading the provisions of the Act, especially a fiscal Act. .... In our opinion the contentions raised by the learned Advocate-General are not well founded. It is plain that the State evinced an intention that it could certainly proceed to apply the penal provisions of the Act against the appellant if it failed to make the return or to meet the demand and in order to escape from such serious

1. (1954) S.C.R. 1122 at p. 1126 : (1954) S.C.J. 445 : (1954) 1 M.L.J. 690 (S.C.).
2. (1947) 2 M.L.J. 16 : L.R. 74 I.A. 50 (P.C.).

consequences threatened without authority of law, and infringing fundamental rights, relief by way of a writ of *mandamus* was clearly the appropriate relief. In *Mohd. Yasin v. The Town Area Committee*,[1] it was held by this Court that a licence fee on a business not only takes away the property of the licensee but also operates as a restriction on his fundamental right to carry on his business and therefore if the imposition of a licence fee is without authority of law it can be challenged by way of an application under Article 32, *a fortiori* also under Article 226. These observations have apposite application to the circumstances of the present case. *Explanation II* to Section 2 (*g*) of the Act having benn declared *ultra vires*, any imposition of sales-tax on the appellant in Madhya Pradesh is without the authority of law and that being so a threat by the State by using the coercive machinery of the impugned Act to realize it from the appellant is a sufficient infringement of his fundamental right under Article 19 (1) (*g*) and it was clearly entitled to relief under Article 226 of the Constitution. The contention that because remedy under the impugned Act was available to the appellant it was disentitled to relief under Article 226 stands negatived by the decision of this Court in *The State of Bombay* v. *The United Motors (India) Ltd.*,[2] above referred to. There it was held that the principle that a Court will not issue a prerogative writ when an adequate alternative remedy was available could not apply where a party came to the Court with an allegation that his fundamental right had been infringed and sought relief under Article 226. Moreover, the remedy provided by the Act is of an onerous and burdensome character. Before the appellant can avail of it he has to deposit the whole amount of the tax. Such a provision can hardly be described as an adequate alternative remedy".

This sufficiently disposes of that contention and I am of the opinion that the High Court was in error when it held that there was no warrant for issuing a writ under Article 226 of the Constitution on the facts disclosed in the Appellant's petition.

On the merits Shri N. C. Chatterjee appearing for the Appellant urged:—

(1) That Article 286 put a fetter on State Legislature and the explanation did not confer any power on any State Legislature to levy any taxes but was meant to explain only clause 1 (a), i.e., what was an outside sale or purchase and that it did not remove any restrictions or fetters and did not convert any inter-State sale or purchase into an intra-State or local or domestic transaction;

(2) That Article 286 (2) in Part XII was meant to implement the supremacy of Parliament with regard to inter-State trade or commerce and it put an embargo on the power of State Legislature to levy any tax on sale or purchase with respect to inter-State trade or commerce and that it was only when the embargo was lifted by appropriate Parliamentary legislation that State Legislature could levy any tax on sales or purchases in the course of inter-State trade or commerce; and

(3) That legislative competence of a State Legislature was derived from Article 246 read with the lists of the Seventh Schedule to the Constitution, that under Article 245 (2) only Parliament was given the power to enact legislation with extra territorial operation and the State Legislatures had no such power, and that the combined effect of Article 246 (3) and Article 245 read with Item 54 of List II was that the State Legislature was only competent to make laws imposing tax on sale or purchase of goods for the whole or part of that State.

The determination of these questions involves a construction of the provisions of Article 286 (1) and (2) of the Constitution and their true scope and effect. These provisions read as follows:—

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1. (1952) S.C.R. 572; (1952) S.C.J. 162. (1953) 4 S.C.R. 1069 (S.C.).
2. (1953) S.C.J. 373: (1953) 1 M.L.J. 743:

"Article 286. (1) No law of a State shall impose, or authorise the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place—

(*a*) outside the State; or

(*b*) in the course of the import of the goods into, or export of the goods out of, the territory of India

Explanation.—For the purposes of sub-clause (*a*), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

(2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce:

Provided that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of this Constitution shall, notwithstanding that imposition of such tax is contrary to the provisions of this clause, continue to be levied until the thirtyfirst day of March, 1951".

They are enacted in Part XII of the Constitution which relates to finance, property, contracts and suits and fall under the caption of 'Miscellaneous Financial Provisions'. Their main purpose is to lay down the restrictions on State Legislatures to enact laws imposing or authorising the imposition of tax on the sale or purchase of goods. Article 286 (1) lays down such restrictions where such sale or purchase takes place—(a) outside the State, or (b) in the course of the import of the goods into, or export of the goods out of, the territory of India. Article 286 (2) lays down such restrictions where such sale or purchase takes place in the course of inter-State trade or commerce. Article 286 (1) is hedged in with the Explanation and Article 286 (2) is hedged in with the exception "in so far as Parliament may by law otherwise provide" and the proviso under which the President might direct that any tax which was being lawfully levied by the Government of any State immediately before the commencement of the Constitution may, notwithstanding the provisions of Article 286 (2), continue to be levied until the 31st March, 1951. Except for these special dispensations the restrictions laid down by Article 286 (1) and (2) prevail and the true scope and extent of these restrictions would have to be culled out of the terms in which these provisions are couched.

These provisions came to be considered by this Court in two cases, (1) The State of Bombay and Another v. The United Motors (India) Ltd. and others[1] and (2) State of Travancore-Cochin and Others v. Shanmugha Vilas Cashew Nut Factory and Others.[2] The first of these cases was concerned with the constitutionality of the Bombay Sales Tax Act XXIV of 1952. The High Court of Bombay had declared the Bombay Sales Tax Act, 1952 ultra vires the State Legislature and had issued a writ in the nature of mandamus against the State of Bombay and the Collector of Sales Tax, Bombay, directing them to forbear and desist from enforcing the provisions of the said Act against the respondents. The main ground of attack in the High Court had been that the Act purported to tax sales and purchases of goods regardless of restrictions imposed on the State legislative power by Article 286 of the Constitution and in that connection the provisions of Article 286 (1) and (2) came to be considered by this Court. The majority judgment of this Court delivered by Patanjali Sastri, C. J., with which Mukherjea, J. and

1. (1953) 4 S.C.R. 1069: (1953) S.C.J. 373: (1953) 1 M.L.J. 743 (S.C.).

2. (1954) S.C.R. 53: (1953) S.C.J. 471: (1953) 2 M.L.J. 123 (S.C.).

Ghulam Hasan, J., concurred held that Article 286 (1) (a) of the Constitution read with the explanation thereto and construed in the light of Articles 301 and 304 prohibits the taxation of sales or purchases involving inter-State elements by all States except the State in which the goods are delivered for the purpose of consumption therein. The latter State is left free to tax such sales or purchases, and it derives this power not by virtue of Article 286 (1) but under Article 246 (3) read with Entry 54 of List II. The majority judgment differed from the view which was taken by me that the Explanation does not deprive the State in which the property in the goods passed of this taxing power and that consequently both the State in which the property in the goods passes and the State in which the goods are delivered for consumption have the power to tax and characterised it as not correct. The majority judgment also held that clause 2 of Article 286 does not affect the power of the State in which the delivery of goods is made to tax inter-State sales or purchases of the kind mentioned in the Explanation to clause (1). The effect of the Explanation is that such transactions are saved from the ban imposed by Article 286 (2). Bose, J. and myself agreed that Article 286 (2) could not be construed in the light of Article 304 (1) as the two articles dealt with different matters. Bose, J., however, held that the basic idea underlying Article 286 is to prohibit taxation in the case of inter-State trade and commerce until the ban under clause (2) of the said Article is lifted by Parliament and always in the case of imports and exports. When the ban is lifted, the Explanation to clause (1) of Article 286 comes into play to determine the situs of the sale. This Explanation does not govern clause (2) of Article 286 and as it can only apply to transactions which in truth and in fact take place in the course of inter-State trade and commerce, there is no need to call it in aid untill the ban is removed. The majority judgment as well as Bose, J., recognised that the provisions of Article 286 (1) and (2) had been enacted in order to prevent multiple taxation which used to be levied by the States before the commencement of the Constitution having resort to the nexus theory. They, however, did not discard that theory altogether and were of the opinion that it was sufficient to invest the State Legislature with jurisdiction to impose a tax on sale or purchase of goods, if any of the essential ingredients of sale had taken place within its territory. They did not accept the transfer of ownership in the goods or the passing of property therein as the sole criterion determining the situs of the sale and thus investing the State within whose territories the sale had thus taken place as the only State entitled to impose the tax on sale or purchase of goods. I, however, held that under the general law relating to sale of goods a sale must be regarded as having taken place in the State in which the property in the goods sold has passed to the purchaser, and that State is entitled to tax the sale or purchase as having taken place inside the State. The Explanation to Article 286 (1) does not take away the right which the State in which the property in the goods passed has to tax the sale or purchase but only deems such purchase or sale, by a legal fiction, to have taken place in the State in which the delivery of the goods have been made for consumption therein so as to enable the latter State also, to tax the sale or purchase in question. The Explanation only lifts the ban imposed by clause (1) (a) on taxation of sales or purchases which take place outside the State, to the extent of the transactions mentioned in the Explanation to enable the delivery State also to tax them. I also held that the general provision enacted in Article 286 (2) against the imposition of tax on the sale or purchase of goods in the course of inter-State trade or commerce should give way to the special provision which is enacted in the Explanation to Article 286 (1) (a)

enabling the delivery State to tax such sale or purchase in the limited class of cases covered by the Explanation, the transactions covered by the Explanation being thus lifted out of the category of transactions in the course of inter-State trade or commerce and assimilated to transactions of sale or purchase which take place inside the State and thus invested with the character of an intra-State sale or purchase so far as the delivery State is concerned. There was thus a divergence between the learned Judges as regards the true scope and effect of the Explanation to Article 286 (1) (a) read with Article 286 (2) and even though the same conclusion was reached by the majority Judges and myself we reached the same on different grounds. The interpretation put on Article 286 (1) (a) read with the Explanation thereto therefore was that the delivery State is left free to tax such sales or purchases as fall within the terms of the Explanation and Article 286 (2) does not affect the power of such a State to tax inter-State trade or commerce of the kind mentioned in the Explanation. The Explanation saves such transactions from the ban imposed by Article 286 (2)..

It may be noted that though there was a consensus of opinion that Article 286 (1) was designed to avoid the multiple taxation of a sale or purchase by various States having resort to the nexus theory there was divergence of opinion as regards the real purpose of the Explanation as also the construction of the non-obstante clause and the true concept of consumption as embodied therein. According to the majority view the Explanation explained what is an outside sale by defining what is an inside sale. Bose, J., was of the opinion that the purpose of the Explanation is to explain what is not outside the State and therefore what is inside. I was of the view that what is otherwise a sale or purchase which takes place outside the State is deemed to have taken place inside the delivery State and the only purpose of the Explanation is to introduce a legal fiction whereby the delivery State is also entitled to tax the transaction of sale or purchase along with the State in which the transfer of ownership has taken place or the property in the goods has passed. The non-obstante clause also was differently interpreted. I took the view that the non-obstante clause is incorporated in the Explanation to state what according to the Constitution-makers is the basic idea of fixing the situs or the location of the sale or purchase in the place where the transfer of ownership takes place or the property in the goods passes and to indicate that notwithstanding that fact a sale or purchase which falls within the category mentioned in the Explanation is nevertheless to be deemed to have taken place inside the delivery State. The majority judgment stated that the non-obstante clause is inserted in the Explanation simply with a view to make it clear beyond all possible doubt that it is immaterial where the property in the goods passes as it might otherwise be regarded as indicative of the place of sale. Bose, J., stated that the object of the Explanation is to fix the location of a sale or purchase by means of a fiction, but he disagreed with the view expressed by me that the non-obstante clause enunciates the general law on this point. He stated that there was no general law which fixed the situs of a sale, not even the Sale of Goods Act, that what the general law does is to determine the place where the property passes in the absence of a special agreement, but the place where the property passes is not necessarily the place where the sale takes place, nor has that ever been regarded as the determining factor. As regards the concept of consumption the majority were of the view that it should be understood as having reference not merely to the individual importer or purchaser but as contemplating distribution eventually to consumers in general within the State. Bose, J., construed that word to mean the usual use made of an article for the purposes of trade and commerce. I adopted the Dictionary

meaning of the term and held that the Explanation covers only those cases where as a direct result of the sale or purchase goods are delivered for consumption in the delivery State by the consumer and it is only that limited class of transactions which are covered by the Explanation and which are liable to tax by the delivery State. I did not accept the contention that the words "for the purpose of consumption" must be accepted in a comprehensive sense as having reference to immediate as well as ultimate consumption within the State and excluding only resales out of the State.

In regard to Article 286 (2) all the Judges were agreed that transactions of sale or purchase in the course of inter-State trade or commerce are within the restriction and no State can tax such transactions, except in the two excepted cases, viz., (1) except in so far as Parliament may by law otherwise provide and (2) provided the President may by order direct that that any tax on sale or purchase of goods which was being levied by the Government of any State immediately before the commencement of the Constitution shall continue to be levied until the 31st March, 1951. The Explanation to Article 286 (1) (a) though it is specifically stated to be for the purposes of sub-clause (a) was construed by me as an exception or proviso to Article 286 (2), thus enabling the delivery State to tax the transactions of sale or purchase taking place in the course of inter-State trade or commerce. The majority Judges differed from this view and held that the Explanation converts the inter-State transaction into an intra-State one and therefore there is no scope at all for the operation of Article 286 (2) in cases covered by the Explanation. Bose, J., was of the view that the Article 286 (2) bans the delivery State also from taxing such transactions, because if the transactions were in the course of inter-State trade or commerce the Explanation merely shifts the point from A to B but this shifting is of no consequence at all, because both the points are caught in the vortex of inter-State trade and commerce. It is only when the Parliament otherwise provides or the President gives the directions within the meaning of the proviso that this ban is lifted and the Explanation is there to settle a matter of considerable controversy regarding the situs of a sale. The argument that on this construction being put on the Explanation to Article 286 (1) and on Article 286 (2) the Explanation would become nugatory though accepted by me was rejected by Bose, J., by pointing out that once the Parliament by law otherwise provided or the President by order gave the direction within the meaning of the proviso the Explanation would come into operation and would determine the situs of the sale thus enabling the appropriate State to impose a tax on such transaction of sale or purchase.

The second case concerned itself with the construction of Article 286 (1) (b) in connection with the sales-tax levied by the State of Travancore-Cochin upon certain dealers in cashewnuts within its territory under the provisions of the Travancore-Cochin General Sales Tax Act 1124 M. E. (Act No. XVIII of 1124 M.E.) and the question for the consideration of the Court was whether certain sales and purchases could be said to be in the course of the import of the goods into or the export of the goods out of the territory of India. The High Court had put a very wide construction on the words of Article 286 (1) (b) and held that the clause is not restricted to the point of time at which goods are imported into or exported from India and the series of transactions which necessarily precede export or succeed import of goods will come within the purview of this clause. There was a divergence of opinion between Patanjali Sastri, C.J., Mukherjea, J., Bose, J. and Ghulam Hasan, J., on the one side and S.R. Das, J., on the other so far as the construction of the words "in the course of" was concern-

ed. But apart from this construction of Article 286 (1) (b) S.R. Das, J., who was not a party to the earlier decision hereinbefore referred to put on record his views on the construction of Article 286 (1) (a), the Explanation thereto and Article 286 (2) expressing his disagreement with the interpretation which the majority judgment in that case had put up on the same. He agreed that the Provincial Legislatures purporting to act under Entry 48 in List II of the Seventh Schedule to the Government of India Act, 1935, had enacted the Sales-tax Acts imposing tax on sales or purchases of goods on the basis of one or more of the ingredients of sale having some connection with the Province and that this practice had resulted in the imposition of multiple taxes on a single transaction of sale or purchase thereby raising the price of the commodity concerned to the serious detriment to the consumer, that this evil had to be curbed and that is what has been done by clause (1) (a) of Article 286. He, however, was of the opinion that in imposing the ban that no law of a State shall impose or authorise the imposition of a tax on the sale or purchase where such sale or purchase takes place outside the State, the Constitution proceeds on the footing that a sale or purchase has a location or situs. He further held that the non-obstante clause in the Explanation also clearly implies that the framers of the Constitution adopted the view that a sale or purchase has a situs and further that it ordinarily takes place at the place where the property in the goods passes. In effect, therefore, the Constitution, by this Explanation to clause (1) (a), acknowledges that under the general law the sale or purchase of the kind therein mentioned may not really take place in the delivery State, but nevertheless requires it to be treated as if it did. That is to say, the Explanation creates a legal fiction. So far he agreed with me, but he differed from me in holding that the only effect of this assignment of a fictional location to a particular kind of sale or purchase in a particular State is to attract the ban of clause (1) (a) and to take away the taxing power of all other States in relation to such a sale or purchase even though the other ingredients which go towards the making up of a sale or purchase are to be found within these States or even if under the general law the property in the goods passes in any of those States. The purpose of the Explanation ends there and cannot be stretched or extended beyond that purpose. He therefore held that the effect of clause (1) (a) read in the light of the Explanation is not to permit both States, viz., the State where the property passes under the general law as well as the State in which, by force of the Explanation, the sale or purchase is deemed to take place, to tax such sale or purchase, because in that event it will stultify the very purpose of that clause and it will fail to prevent the imposition of multiple taxes which it is obviously designed to prevent. In his opinion clause (1) (a) in terms only takes away the taxing power of all States with respect to a sale or purchase which, by reason of the fiction introduced by the Explanation, is to be deemed to take place outside their respective territories and the purpose of the Explanation is only to explain the scope of clause (1) (a). The Explanation is neither an exception nor a proviso. It is not its purpose nor does it purport, substantively and proprio vigore, to confer any power on any State, not even on the delivery State, to impose any tax. Whether the delivery State can tax the sale or purchase of the kind mentioned in the Explanation will depend on other provisions of the Constitution. Neither clause (1) (a) nor the Explanation has any bearing on that question.

So far as the purpose and design of clause (2) are concerned he was of the opinion that clause (2) places yet another ban on the taxing power

of the State under Entry 54 read with Article 246 (3), in addition to the ban imposed by clause (1) (a). A sale or purchase contemplated by the Explanation to clause (1) (a) undoubtedly partakes of the nature of a sale or purchase made in the course of inter-State trade and, therefore, no State, whether it is the State in which the property in the goods passes under the general law or the State where the goods are delivered as mentioned in the Explanation, can impose a tax on such sale or purchase, unless and until Parliament lifts this ban. He differed from the view taken by me that the Explanation to Article 286 (1) (a) must be regarded not only as having authorised the delivery State to impose the tax on the sale or purchase covered by the Explanation, but having also exempted it from the ban imposed by clause (2). He also differed from the majority view that what was an inter-State transaction within the ban of Article 286 (2) is converted into an intra-State or local or domestic transaction by virtue of the Explanation to Article 286 (1) (a). He saw no warrant for the argument that the fiction embodied in the Explanation for this definitely expressed purpose, can be legitimately used for the entirely foreign purpose of destroying the inter-State character of the transaction and converting it into an intra-State sale or purchase for all purposes. Such metamorphosis is completely beyond the purpose and purview of clause (1) (a) and the Explanation thereto.

After expressing himself as above, he made the following observations which are very apposite to the appeal before us:—

"To accede to this argument will mean that the Sales Tax Officer of the delivery State will have jurisdiction to call upon dealers outside that State to submit returns of their turnover in respect of goods delivered by them to dealers in that State under transactions of sale made by them with dealers within that State. Thus a dealer in, say, Pepsu who delivers goods to a dealer in, say, Travancore-Cochin will become subject to the jurisdiction of the last mentioned State and will have to file returns of their turnover and support the same by producing their books of account there. I cannot imagine that our Constitution-makers intended to produce this anomalous result. On the contrary, it appears to me that they enacted clauses (1) (*a*) and (2) for the very purpose of preventing this anomaly. I repeat that it is not permissible, on principle or on authority, to extend the fiction of the *Explanation* beyond its immediate and avowed purpose which I have explained above. In my judgment, until Parliament otherwise provides, all sales or purchases which take place in the course of inter-State trade or commerce are, by clause (2) of Article 286, made immune from taxation by the law of any State, irrespective of the place where the sales or purchases may take place, either under the general law or by virtue of the fiction introduced by the *Explanation* to clause (1) (*a*). If a particular inter-State sale or purchase takes place outside a State, either under the general law or by virtue of the fiction created by the *Explanation*, it is exempted from taxation by the law of that State both under clause (1) (*a*) and clause (2). If such inter-State sale or purchase takes place within a particular State, either under the general law or by reason of the *Explanation*, it is still exempt from taxation even by the law of that State under clause (2), just as a sale or purchase which takes place within a State, either under the general law or by reason of the *Explanation* cannot be taxed by the law of that State, if such sale or purchase takes place in the course of import or export within the meaning of clause (1) (*b*)".

It may be observed that the contentions urged before us by the Appellant are in conformity with the above observations of S. R. Das, J.

Normally speaking the construction put by the majority judgment on the Article 286 (1), the Explanation thereto and Article 286 (2) of the Constitution in the Bombay Sales Tax Appeal would be the law binding on all parties and in the judgment just referred to in the Travancore-Cochin Sales Tax Appeal S. R. Das, J., rightly expressed that decision to be binding on him so long as it stands. The appellant has, however, sought to urge before us that that decision was erroneous and has attempted to

persuade us to reconsider the same and put a construction on Article 286 (1) (a), the Explanation thereto and Article 286 (2) which is different from that adopted by the majority Judges in the Bombay Sales Tax Appeal.

The question therefore arises whether we are entitled to reconsider that decision.

The House of Lords in England has always considered itself bound by its previous decisions. These decisions, as distinguished from the opinions which are delivered by the Judicial Committee of the Privy Council as advice to the Crown, are pronounced in the form of judgments and are binding on the House as precedents. The question whether the House had the power to reconsider the previous decisions of its own and if it thought the decisions wrong to overrule or depart from them in subsequent cases was considered in *Street Tramways* v. *London County Council*.[1] Earl of Halsbury, L.C., who delivered the judgment of the House observed at page 379:—

"A decision of this House once given upon a point of law is conclusive upon this House afterwards, and that it is impossible to raise that question again as if it was *res integra* and could be reargued, and so the House be asked to reverse its own decision. That is a principle which has been, I believe, without any real decision to the contrary, established now for some centuries, and I am therefore of opinion that in this case it is not competent for us to rehear and for counsel to reargue a question which has been recently decided".

The reason of the rule was thus stated at page 380:—

"Of course I do not deny that cases of individual hardship may arise, and there may be a current of opinion in the profession that such and such a judgment was erroneous; but what is that occasional interference with what is perhaps abstract justice as compared with the inconvenience—the disastrous inconvenience—of having each question subject to being reargued and the dealings of mankind rendered doubtful by reason of different decisions, so that in truth and in fact there would be no real final Court of Appeal? My Lords, 'interest *rei publicae*' that there should be '*finis litium*' at some time, and there could be no '*finis litium*' if it were possible to suggest in each case that it might be reargued, because it is 'not an ordinary case', whatever they may mean":

and the conclusion was thus recorded at page 381:—

"Under these circumstances it appears to me that your Lordships would do well to act upon that which has been universally assumed in the profession, so far as I know, to be the principle, namely, that a decision of this House upon a question of law is conclusive, and that nothing but an Act of Parliament can set right that which is alleged to be wrong in a judgment of this House".

The Judicial Committee of the Privy Council on the other hand has held that it is free to differ from its own decisions or from those of the House of Lords. The power of the Privy Council to reconsider its own decisions was discussed in In re *Compensation to Civil Servants*.[2] In that case an earlier decision of the Board in *Wigg* v. *Attorney-General of the Irish Free State*[3] was attempted to be reviewed and after discussing the case-law on the point the Board came to the conclusion that the Privy Council is not bound in law and without examination to follow the decision in a prior appeal whether they considered it to be right or wrong although the Privy Council would hesitate long before disturbing a solemn decision by a previous Board, which raised an identical or even a similar issue for determination. While laying down this principle the Board discussed the earlier cases and in particular the case of *Ridsdale* v. *Clifton*[4] which was followed in *Tooth* v. *Power*[5] and *Read* v. *Bishop of Lincoln*[6] and the proposition was thus laid down in the last mentioned case:—

1. L.R. (1898) A.C. 375.
2. 56 M.L.J. 363 : A.I.R. 1929 P.C. 84 (P.C.).
3. A.I.R. 1928 P.C. 239.
4. (1877) 2 P.D. 276.
5. L.R. (189) A.C. 248.
6. L.R. (1892) A.C. 644.

"In the present case their Lordships cannot but adopt the view expressed in *Ridsdale* v. *Clifton*[1] as to the effect of previous decisions. Whilst fully sensible of the weight to be attached to such decisions, their Lordships are at the same time bound to examine the reasons upon which the decisions rest, and to give effect to their own view of the law".

The same principle was reiterated by the Privy Council in *Attorney-General of Ontario and Others* v. *Canada Temperance Federation and Others*[2]. The Board was there concerned with the consideration of a constitutional question. An earlier decision of the Board in *Russell* v. *Reg*[3] had upheld the validity of the impugned statute. That decision had stood unreversed for 63 years and had moreover received express approval of the Board in subsequent cases between 1883 and 1937. It was contended that the case had been wrongly decided and ought to be overruled and their Lordships repelled that contention:—

"Their Lordships do not doubt that in tendering humble advice to His Majesty they are not absolutely bound by previous decisions of the Board, as is the House of Lords by its own judgments In ecclesiastical appeals, for instance, on more than one occasion, the Board has tendered advice contrary to that given in a previous case, which further historical research has shown to have been wrong. But on constitutional questions it must be seldom indeed that the Board would depart from a previous decision which it may be assumed will have been acted upon both by governments and subjects. In the present case the decision now sought to be overruled has stood for over sixty years; the Act has been put into operation for varying periods in many places in the Dominion; under its provisions businesses must have been closed, fines and imprisonments for breaches of the Act have been imposed and suffered. Time and again the occasion has arisen when the Board could have overruled the decision had it thought it wrong. Accordingly, in the opinion of their Lordships, the decision must be regarded as firmly embedded in the constitutional law of Canada and it is impossible now to depart from it".

It is therefore settled law so far as England is concerned that their Lordships of the Privy Council do not consider themselves bound in law and without examination to follow their decision in a prior appeal whether they consider it to be right or wrong but feel themselves bound to examine the reasons upon which the decisions rest and to give effect to their own view of the law. We here are the highest Court of the land and would derive considerable assistance from the practice of the Privy Council set out above.

The High Court of Australia is the highest Court of Appeal in the Commonwealth and concerns itself *inter alia* with deciding constitutional questions. The question whether it is bound by its previous decisions came up for consideration in the *Tramways Case* (*No.* 1)[4] and the High Court held that it was not bound by its previous decision but would only review a previous decision when that decision was manifestly wrong. Griffith, C.J., in this connection made the following observations at page 58:—

"In my opinion it is impossible to maintain as an abstract proposition that the Court is either legally or technically bound by previous decisions. Indeed, it may in a proper case be its duty to disregard them. But the rule should be applied with great caution, and only when the previous decision is manifestly wrong............Otherwise there would be grave danger of a want of continuity in the interpretation of the law".

Barton, J., observed at page 69:—

"In conclusion, I would say that I have never thought that it was not open to this Court to review its previous decisions upon good cause. The question is not whether the Court can do so, but whether it will, having due regard to the need for continuity and consistency in judicial decisions. Changes in the number of appointed Justices can, I take it, never of themselves furnish a reason for review. That the prior decision was that of little more than half their number might be urged with greater fairness, but it cannot be urged against an earlier case...............But the Court can always listen to argument as to whether it ought to review a particular decision, and the strongest reason for an overruling is that a decision is manifestly wrong, and its maintenance is injurious to the public interest".

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1. (1877) 2 P.D. 276.
2. 1946 F.L.J. 50 : A.I.R. 1946 P.C. 88 (P.C.).
3. L.R. (1882) 7 A.C. 829.
4. 18 C.L.R. 54.
5. 17 C.L.R. 261 at p. 292.

Powers, J., at page 86, referred to an earlier decision given by him in the case of *The Australian Agricultural Co.* v. *Federated Engine-Drivers and Firemen's Association of Australasia*[5]:—

"I am at all times prepared to consider the review of any decision of this Court, by a Full Bench called to consider that question, and to reverse any decision if it is shown to be clearly wrong, subject to the well-known considerations to be applied to the particular case in question at the time, according to the well-known judicial policy of British, Australian and American Courts, and I think of all Courts of Appeal in English-speaking communities"—except the House of Lords................ "I decline even to consider a question of reversing a decision of this Court casually, or even seriously, raised by counsel, not clearly urgent, and not raised before as full a bench as is available. If we do not show some respect to our own Court's decisions, no counsel will feel safe in advising the public, and it will create uncertainty and confusion"............................"Under those circumstances I think it would have to be shown that the decision was clearly wrong, and, as it has been followed by this Court in other cases, that it would be in the interests of the public to reverse it".

This question came for consideration again by the High Court of Australia in *The Amalgamated Society of Engineers* v. *The Adelaide Steamship Company Limited and Others*[1] and the majority judgment stated at p. 142:—

"It is therefore, in the circumstances, the manifest duty of this Court to turn its earnest attention to the provisions of the Constitution itself. That instrument is the political compact of the whole of the people of Australia, enacted into binding law by the Imperial Parliament, and it is the chief and special duty of this Court faithfully to expound and give effect to it according to its own terms, finding the intention from the words of the compact, and upholding it throughout precisely as framed. In doing this we follow, not merely previous instances in this Court and other Courts in Australia, but also the precedent of the Privy Council in *Read* v. *Bishop of Lincoln*[2] where the Lord Chancellor, speaking for the Judicial Committee in relation to reviewing its own prior decisions, said: 'Whilst fully sensible of the weight to be attached to such decisions, their Lordships are at the same time bound to examine the reasons upon which the decisions rest, and to give affect to their own view of the law'. The ground upon which the Privy Council came to that conclusion we refer to, but need not repeat, adding, however, that as the Commonwealth and State Parliaments and Executives are themselves bound by the declarations of this Court as to their powers *inter se*, our responsibility is so much the greater to give the true effect to the relevant constitutional provisions. In doing this, to use the language of Lord Macnaughten in *Vacher & Sons Ltd.* v. *London Society of Compositors*,[3] "a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the Court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction".

Higgins, J., at page 160 added:—

"But the decision is now directly impugned by the claimant; and it is our duty to reconsider the subject, and to obey the Constitution and the Act rather than any decision of this Court, if the decision be shown to have been mistaken".

The High Court of Australia has therefore considered itself free to review its own decisions just as much as the Judicial Committee of the Privy Council examine the reasons upon which the decisions rest and to give effect to its own views of the law, in other words to reconsider the subject and to obey the Constitution and the Act rather than any decision of the Court if the decision be shown to have been mistaken.

Our Constitution has drawn freely *inter alia* upon the Constitution of the United States and it would be helpful to consider what is the position in the United States in regard to the re-consideration of its previous decisions by the Supreme Court. There have been numerous decisions of the Supreme Court in which the Court has departed from the doctrine of *stare decisis* and has either refused to follow or overruled its previous decisions.

In *Hertz* v. *Woodman*[4] Mr. Justice Lurton observed:—

"The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the Court, which again is called upon to consider a question once decided".

1. 28 C.L.R. 129.
2. L.R. (1892) A.C. 644.
3. L.R. (1913) A.C. 107 at p. 118.
4. 218 U.S. 205.

Mr. Justice Brandies while delivering his dissenting opinion in *Washington* v. *Dawson & Co.*[1] thus expressed himself with regard to the propriety upon the part of the Supreme Court of departing from its earlier doctrines if it has come to consider those doctrines as erroneous:—

"The doctrine of *stare decisis* should not deter us from overruling that case and those which follow it The decisions are recent ones. They have not been acquiesced in. They have not created a rule of property around which vested interests have clustered. They affect solely matters of a transitory nature. On the other hand, they affect seriously the the lives of men, women, and children, and the general welfare. *Stare decisis* is ordinarily a wise rule of action. But it is not a universal, inexorable command. The instances in which the Court has disregarded its admonition are many".

The same learned Judge in a dissenting opinion in *David Burnet* v. *Coronado Oil & Gas Company,*[2] reiterated the same position in the manner following:—

"*Stare decisis* is not, like the rule of *res judicata,* a universal, inexorable command".

After quoting the passage from the judgment of Mr. Justice Lurton in *Hertz* v. *Woodman,*[3] above cited the learned Judge proceeded:—

"*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right............This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function...................Recently, it overruled several leading cases; when it concluded that the States should not have been permitted to exercise powers of taxation which it had therefore repeatedly sanctioned. In cases involving the Federal Constitution the position of this Court is unlike that of the highest Court of England, where the policy of *stare decisis* was formulated and is strictly applied to all classes of cases. Parliament is free to correct any judicial error; and the remedy may be promptly invoked".

It will be instructive at this juncture to note the following passages to be found in foot-note 3 at p. 825 in the report of this case[4]:—

"Compare Taney, Ch. J. in Passenger Cases, 7 How 283, 470, 12 L. ed. 702; 780: "After such opinions judicially delivered, I had supposed that question to be settled, so far as any question upon the construction of the Constitution ought to be regarded as closed by the decision of this Court. I do not, however object to the revision of it, and am quite willing that it be regarded hereafter as the law of this Court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported".

Compare Field, J. in *Barden* v. *Northern P. R. Co.*:[5]

"It is more important that the Court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations. Those doctrines only will eventually stand which bear the strictest examination and the test of experience".

In *Mark Graves* v. *People of the State of New York,*[6] Mr. Justice Frankfurter stated:—

"But the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it".

The same principle was reiterated in *Smith* v. *Allwright*[7]:—

"In reaching this conclusion we are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to re-examine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day".

1. 264 U.S. 219.
2. 285 U.S. 393.
3. 218 U.S. 205.
4. 76 L.Ed. 815.
5. 154 U.S. 288, 322.
6. 306 U.S. 466 at p. 491.
7. 321 U.S. 649.

and in *United States of America* v. *South-Eastern Underwriters Association*,[1] in the dissenting judgment of Stone, C.J. at p. 579:—

"This Court has never committed itself to any rule or policy that it will not "bow to the lessons of experience and the force of better reasoning" by overruling a mistaken precedent..............'This is especially the case when the meaning of the Constitution is at issue and a mistaken construction is one which cannot be corrected by legislative action. To give blind adherence to a rule or policy that no decision of this Court is to be overruled would be itself to overrule many decisions of the Court which do not accept that view. But the rule of *stare decisis* embodies a wise policy because it is often more important that a rule of law be settled than that it be settled right. This is especially so where as here Congress is not without regulatory power...........The question then is not whether an earlier decision should ever be overruled, but whether a particular decision ought to be. And before overruling a precedent in any case it is the duty of the Court to make certain that more harm will not be done in rejecting than in retaining a rule of even dubious validity".

The position has been thus summarised by Willoughby on the Constitution of the United States—Vol. I—Second Edition—at p. 74:—

"There are indeed good reasons why the doctrine of *stare decisis* should not be so rigidly applied to the constitutional as to other laws. In cases of purely private import, the chief desideratum is that the law remain certain, and, therefore, where a rule has been judicially declared and private rights created thereunder, the Courts will not, except in the clearest cases of error, depart from the doctrine of *stare decisis*. When, however, public interests are involved, and especially when the question is one of constitutional construction, the matter is otherwise. An error in the construction of a statute may easily be corrected by a legislative act, but a Constitution and particularly the Federal Constitution, may be changed only with great difficulty. Hence an error in its interpretation may for all practical purposes be corrected only by the Court's repudiating or modifying its former decision".

These then are the principles which should guide us in determining whether we should reconsider the earlier decisions of this Court. We are here not merely concerned with legislative enactments which it would be within the competence of either the Union Legislature or the State Legislatures to enact if our earlier decisions were erroneous. We are concerned with the construction of the provisions of the Constitution which it will be almost impossible to amend. The House of Lords considered itself bound by its previous decisions, because it felt that the Act of Parliament could set right an erroneous decision of the House by enacting appropriate legislation. But the High Court of Australia as well as the Supreme Court of the United States felt themselves free to reconsider their earlier decisions because of the practical impossibility of correcting the erroneous decisions through legislative action. They considered it their bounden duty to construe the constitutional provisions and be guided by the provisions of the Constitution itself and not by what had been their earlier decisions on the questions of its construction. The only safeguard which they put on the exercise of such powers of reconsideration was that the earlier decision should be manifestly wrong or erroneous. We here also are concerned with the construction of the provisions of the Constitution which cannot be amended so easily and if we come to the conclusion that the earlier decision was manifestly wrong or erroneous and that public interest demanded that the same should be reconsidered we should not have the slightest hesitation in doing so. We therefore approach the consideration of the earlier decision of this Court in the Bombay Sales Tax Appeal bearing in mind the principles above enunciated.

It will be necessay at the outset to take stock of the situation as it obtained before the enactment of Article 286 of the Constitution. The Government of India Act, 1935, contained provisions in regard to the distribution of legislative powers between the Dominion and the Provincial Legislatures in sections 99 and 100. The Dominion Legislature was competent to make laws including laws having extra territorial operation for the whole or any part of the Dominion and the Provincial Legislatures were competent to make laws for the Province or for any part thereof. The legislative heads in respect of which the laws could

1. 322 U.S. 533.

be made by the respective Legislatures were enumerated in the lists of the Seventh Schedule to the Act and the demarcation between the powers of the Dominion Legislature and the Provincial Legislatures in that behalf was to be found in section 100. Entry 48 in List II of the said Schedule gave the power to the Provincial Legislatures in respect of "taxes on the sale of goods and on advertisments". Even though the entry mentioned taxes on sale of goods that head was construed to mean in reality a power to tax the transaction and the power to tax the transaction carried with it the power to tax either party thereto. The expression "taxes on sale" was therefore construed to include also a tax on purchases of goods, as the transaction resulted in change of ownership from one person to another and was from its very nature a bilateral transaction with a seller on the one hand and the purchaser on the other. (Vide *V. M. S. Md. & Co.* v. *State of Madras*.[1] The same distribution of legislative powers obtained when the Constitution came to be enacted and Article 245 provided that Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State. Exclusive power to make laws with respect to the legislative heads enumerated in the Union List (List I) and the State List (List II) of the Seventh Schedule to the Constitution was given to Parliament and the State Legislatures respectively by Article 246. Entry 54 of the State List gave the exclusive power to the State Legislatures with respect to taxes on the sale or purchase of goods other than newspapers. What was implicit in the phraseology of Entry 48 of List II of the Seventh Schedule to the Government of India Act was thus made explicit by the phraseology adopted in Entry 54 of the State List in the Seventh Schedule to the Constitution.

Prima facie laws enacted by State Legislatures would have operation within the territories of the States. Primarily legislation of a country is territorial and the general rule is "*extra territorium jus dicenti impune non paretur*". The laws of a nation apply to all its subjects and to all things and acts within its territories. (*See* Maxwell on the Interpretation of Statutes—10th Edn. page 144). Craies' on Statute Law—5th Edn. at p. 174 contains the following citation from the speech of Lord Cranworth in *Jeffreys* v. *Boosey*[2]:—

> "*Prima facie* the Legislature of this country must be taken to make laws for its own subjects exclusively".

The same principle has been applied also to sales tax and it is stated in American Jurisprudence, Volume 47, page 202, para. 5 under the caption "Territorial Jurisdiction":—

> "The general rule that a State may not tax persons, property or interests which are not within its territorial jurisdiction is applicable to sales taxes".

It would therefore appear that when the State Legislatures enacted laws in respect of taxes on sales or purchses of goods they would only have operation within the territories of the States and the sales or purchases of goods even though they are not specified in the relative entry to be "within the territories" of the States would *prima facie* be such as take place within the respective territories of the States.

This power to tax the sales or purchases of goods would again have to be construed with reference to the connotation of the term "sale" as it was understood in the legislative practice of the country at the time when the power was conferred. As was observed by Their Lordships of the Privy Council in *Croft* v. *Dunphy*.[3]

> "When a power is conferred to legislate on a particular topic it is important, in determining the scope of the power, to have regard to what is ordinarily treated as embraced within

1. (1952) 2 M.L.J. 598 : A.I.R. 1953 Mad. 105.
2. (1854) 4 H.L.C. 815 at p. 955.
3. L.R. (1933) A.C. 156 at p. 165.

that topic in legislative practice and particularly in the legislative practice of the State which has conferred the power".

The expression "sale of goods" in Entry 48 in List II of the Seventh Schedule to the Government of India Act, 1935, came to be construed by this Court in *Sales Tax Officer, Pilibhit* v. *Budh Prakash Jai Prakash*[1], in relation to an attempt by the State of Uttar Pradesh to tax forward contracts of sale and this Court held:—

"There having existed at the time of the enactment of the Government of India Act, 1935, a well-defined and well-established distinction between a sale and an agreement to sell it would be proper to interpret the expression 'sale of goods' in Entry 48 in the sense in which it was used in legislation both in England and India and to hold that it authorises the imposition of a Tax only when there is a completed sale involving transfer of title".

The expression "sale of goods" was construed in the light of the definition thereof to be found in section 4 of the Indian Sale of Goods Act (Act III of 1930) as also the corresponding provision of the English Sale of Goods Act and the relevant passage from Halsbury's Law of England, Volume 15, Para. 13, quoted therein. Section 4 of the Indian Sale of Goods Act runs as follows:—

"(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.

* * * *

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses, or the conditions are fulfilled subject to which the property in the goods is to be transferred".

The corresponding provision in section 1 of the English Sale of Goods Act is as follows:—

"(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part-owner and another.

* * * *

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafer to be fulfilled the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred".

This being the legislative practice in India as well as in England at the time when the power to tax sales or purchases of goods was conferred on the State Legislatures the scope of that power would have been ordinarily determined by the definition of the Sale of Goods to be found in these respective Sales of Goods Acts and the State Legislatures would have had the power to tax sales or purchases of goods in which the property in the goods passed within the respective territories of the States. This was not a power to tax seller or a purchaser *in personam*. It was a power to tax the sale or purchase of goods which took place within the territories of the State and was to be exercised in those cases where the property in the goods which were the subject-matter of the sale or purchase passed within the territories of the State.

This position however was not acceptable to the various States which wanted to enlarge the scope of their power to tax sales or purchases of goods. There was therefore an attempt made to analyse the concept of sale into its various ingredients and to fasten upon any one of the ingredients as conferring upon them the power to tax the sale or purchase of goods by having resort to the theory of territorial connection or nexus. As was observed by Bose, J., in

1. (1954) S.C.J. 573 : (1954) 2 M.L.J. 124 : A.I.R. 1954 S.C. 459 (S.C.).

The State of Bombay and Another v. *The United Motors (India), Limited and Others*,[1] at page 1101:—

"The difficulty is apparent when one begins to split a sale into its component parts and analyse them. When this is done, a sale is found to consist of a number of ingredients which can be said to be essential in the sense that if any one of them is missing there is no sale. The following are some of them: (1) the existence of goods which form the subject-matter of the sale, (2) the bargain or contract which, when executed, will result in the passing of the property in the goods for a price, (3) the payment, or promise of payment, of a price, (4) the passing of the title".

Having analysed the concept of the sale thus into its essential ingredients the only essential condition which was considered necessary to be satisfied was the completion of the transaction of sale wheresoever it may take place and the taxable event was taken to be any one of these essential ingredients provided it took place within the territories of the State. Reliance was placed for this purpose on the decision of the Federal Court in In re *The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act*, 1938, (*Central Provinces and Berar Act No. XIV of* 1938),[2] where Their Lordships observed that:—

"Tax on sale of goods must necessarily be a tax imposed at the time of the sale of goods and must exclude other forms of transfer like mortgages, leases, etc."

Similar observations were also to be found in the *Province of Madras* v. *Boddu Paidanna & Sons*[3] where it was stated that a tax on the sale of goods is a tax levied on the occasion of the sale of goods and the liability to tax arises on the occasion of the sale. The sale was therefore taken to be the concrete event which gave rise to the power of the State to tax the sale of goods but was taken as not necessarily taking place within the territories of the taxing State, the only thing considered essential for the purpose being the territorial connection or nexus between the taxing State and one or more of the necessary ingredients of sale analysed as above. The territorial connection or nexus theory was sought to be supported by reference to certain decisions of the High Court of Australia, *e.g.*, *The Wanganui-Rangitikey Electric Power Board* v. *The Australian Mutual Provident Society*,[4] where Dixon, J., observed:—

"So long as the statute selected some fact or circumstance which provided some relation or connection with New South Wales, and adopted this as the ground of its interference, the validity of an enactment reducing interest would not be open to challenge",

and the dissenting judgment of Rich, J. in *Broken Hill South Ltd.* v. *Commissioner of Taxation (N.S.W.)*[5] which stated that:—

"I do not deny that once any connection with New South Wales appears the legislature of that State may make that connection the occasion or subject of the imposition of a liability. But the connection with New South Wales must be a real one and the liability sought to be imposed must be pertinent to that connection".

These observations of the learned Judges of the High Court of Australia were referred to with approval by our Federal Court in *Governor-General-in-Council* v. *Raleigh Investment Co. Ltd.*[6] It was an income-tax case and the dispute related to the claim of the Indian Government to levy income-tax and super tax on the dividends paid to the assessee company (which was a joint stock company incorporated under the English Companies Act having its registered offices in the Isle of Man and its main offices in England) by nine sterling companies, the bulk of whose shares were held by the assessee company. These sterling companies were registered under the English Companies Act and were controlled in London where the Boards of Directors sat, the share registers were situate and

1. (1953) S.C.J. 373 : (1953) 1 M.L.J. 743: (1953) 4 S.C.R. 1069 (S.C.)
2. 1939 F.C.R. 18 at pp. 86, 87 : (1939) 1 M.L.J. (Sup.) 1.
3. 1942 F.C.R. 90 at p. 101 : (1942) 2 M.L.J. 327.
4. (1934) 50 C.L.R. 581 at p. 600.
5. (1937) 56 C.L.R. 331 at p. 361.
6. A.I.R. 1944 F.C. 51 : 1944 F.C.R. 229 : (1944) 1 M.L.J. 477 (S.C.).

dividends were declared. They however carried on the business of manufacturing and selling tobacco and cigarettes in India and the business in India where all profits were made was managed by the local boards which were constituted by the Boards in London. The financial Policies of these companies were controlled by the London Boards and in all important matters of business the London Boards were consulted and all the general meetings of the Companies were held in England. The dividends of these Companies were also declared by them in England and paid by them in England to the assessee company in England. It was however held that the source of the dividends paid to the assessee company by the sterling companies was British Indian and when the attempt was to tax income and not the corpus and the question to be considered was the 'source' of that income it was legitimate to take into account the place where the business from which the income was derived, was in fact carried on and not to treat the situs of the shares in the eyes of the law as concluding the matter. The Court was therefore of the opinion that the source of the dividends paid to the assessee company by the sterling companies was British Indian and that in making them liable to income-tax on that basis the Indian Legislature was not giving its law any extra-territorial operation. Spens, C.J, who delivered the judgment of the Court further quoted with approval the following passage from the judgment of Evatt, J., in *Trustees, Executors & Agency Co., Ltd.* v. *Federal Commisssioner of Taxation,*[1] at p. 236:—

"The Constitution requires that it must be possible to predicate of every valid law that it is for the peace order and good government of the Dominion with respect to a granted subject, *e g.*, customs, taxation, external affairs. In such cases, the presence of non-territorial elements in the challenged law has to be considered upon a slightly different footing and those affirming its validity have to show not only that the Dominion has some real concern or interest in the matter, thing or circumstance dealt with by the legislation, but that the concern or interest is of such a nature that the challenged law is truly one with respect to an enumerated subject-matter".

Two more decisions of the Federal Court reiterating the same principle may be noted in this context: *Wallace Bros. & Co. Ltd.* v. *Commissioner of Income-tax, Bombay City*[2] and *A. H. Wadia* v. *Commissioner of Income-tax, Bombay.*[3] In the former case the Court held that where the Imperial Parliament has conferred a power to legislate on a particular topic it is permissible and important in determining the scope and meaning of the power to have regard to what is ordinarily treated as embraced within that topic in the legislative practice of the United Kingdom. The general conception as to the scope of the legislative practice in the United Kingdom with regard to income-tax is that given a sufficient territorial connection between the person sought to be charged and the country seeking to tax him, income-tax may properly extend to that person in respect of his foreign income. That general conception, both on a consideration of the British legislation and as a matter of construction of the Government of India Act, 1935, finds a place in the phrase "taxes on income" as used in that Act and the principle of sufficient territorial connection is implicit in the power conferred by the Act of 1935. The derivation from British India of the major portion of its income for a year gives to a company as respects that year a territorial connection sufficient to justify the company being treated as at home in British India for all purposes relating to taxation on its income for that year from whatever source it may be derived, and if it is so at home in British India it is a person properly subject to the jurisdiction of the Central Indian legislature. In the latter case the Court held that a law imposing a tax cannot be impugned on the ground that it is extra-territorial if there is a connection between the person who is subject to the tax and the country which imposes that tax. The connection must however be a real one and the liability sought to be imposed

1. (1933) 49 C.L.R. 220.
2. 1948 F.C.R. 1 : L.R. 75 I.A. 86 : (1948) 2 M.L.J 62 (P.C.).
3. 1948 F.C.R. 121 : (1949) 1 M.L.J. 335.

most be pertinent to that connection; but if these conditions are satisfied it is of no importance on the question of validity that the liability imposed is, or may be, disproportionate to the territorial connection. Kania, C.J., also observed at p. 141:—

"As mentioned above, the aspect of it affecting persons who are beyond the jurisdiction of the municipal Courts cannot be considered sufficient for the Court to hold it *ultra vires*. The municipal Courts are bound to enforce the law. Whether after obtaining the opinion or decree the same is enforceable against the other side or not, is not a matter for the Court's consideration. The Court has only to see that the legislation is within the ambit of the powers of the Legislature".

Having resort therefore to the territorial connection or the nexus theory enunciated in the cases above noted and analysing the concept of sale into its necessary ingredients as above the various State Legislatures enacted laws in respect of taxes on sales or purchases of goods spreading their net as wide as they could having regard to the situation obtaining in their respective territories. A transaction of sale or purchase of goods thus came to be taxed by more States than one even though really there was only one transaction of sale or purchase of goods as between the seller and the purchaser. The consumer was the last person who ever counted in the scramble for taxes on sales or purchases of goods and even the free flow of inter-State trade and commerce was affected. The state of affairs was thus graphically described by Patanjali Sastri, C.J., in his judgment in Bombay Sales Tax Appeal[1] at p. 1079:—

"In exercise of the legislative power conferred upon them in substantially similar terms by the Government of India Act, 1935, the Provincial Legislatures enacted sales-tax laws for their respective Provinces, acting on the principle of territorial nexus referred to above; that is to say, they picked out one or more of the ingredients constituting a sale and made them the basis of their sales-tax legislation. Assam and Bengal made among other things the actual existence of the goods in the Province at the time of the contract of sale the test of taxability. In Bihar the production or manufacture of the goods in the Province was made an additional ground. A net of the widest range perhaps was laid in Central Provinces and Berar where it was sufficient if the goods were actually 'found' in the Province at any time after the contract of sale or purchase in respect thereof was made. Whether the territorial nexus put forward as the basis of the taxing power in each case would be sustained as sufficient was a matter of doubt not having been tested in a court of law. And such claims to taxing power led to multiple taxation of the same transaction by different Provinces and cumulation of the burden falling ultimately on the consuming public. This situation posed to the Constitution makers the problem of restricting the taxing power on sales or purchases involving inter-State elements, and alleviating the tax burden on the consumer"

Apart from the States resorting to the territorial connection or nexus theory in the manner aforesaid the Courts also appeared to lend their support to the theory and the High Court of Madras in particular in two decisions, *Poppatlal Shah* v. *State of Madras*[2] and *C. G. Naidu & Co.* v. *State of Madras*,[3] gave its imprimatur to this theory. In the former case the expression "sale of goods" was understood in its popular sense as distinct from its legal sense and it was held that the sales tax could be levied if the transaction substantially took place within the State notwithstanding that the property did not pass within the State. In the latter case it was held that the power of the State to impose taxes was not conditioned on the subject-matter being wholely within its jurisdiction and the exercise of the power was valid if there was sufficient territorial connection with reference to the subject-matter. After discussing the American case law on the subject the Court came to the conclusion that in respect of inter-State sales the State in which the contract was concluded was the only State which had the power to impose a tax. This Court also in the majority judgment in the Bombay Sales Tax Appeal[1] while summarising the position as it obtained before the enactment of the Constitution incidentally expressed its opinion in this behalf at p. 1078 as under:—

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1 (1953) S.C.J. 373: (1953) 1 M.L.J. 243: (1953) 4 S.C.R. 1069 (S.C.).
2. (1952) 2 M.L.J 593 : A.I.R. 1953 Mad. 91.
3. (1952) 2 M.L. J. 614 : A.I.R. 195 Mad 116.

'As pointed out by the Privy Council in the *Wallace Brothers case*,[1] in dealing with the competency of the Indian Legislature to impose tax on the income arising abroad to a non-resident foreign company, the constitutional validity of the relevant statutory provisions did not turn on the possession by the legislature of extra-territorial powers but on the existence of a sufficient territorial connection between the taxing Staae and what it seeks to tax. In the case of sales-tax it is not necessary that the sale or purchase should take place within the territorial limits of the State in the sense that all the ingredients of a sale like the agreement to sell, the passing of title, delivery of the goods, etc., should have a territorial connection with the State. Broadly speaking, local activities of buying or selling carried on in the State in relation to local goods would be a sufficient basis to sustain the taxing power of the State, provided of course, such activities ultimately resulted in a concluded sale or purchase to be taxed".

In another case decided immediately thereafter *Poppaptlal Shah* v. *The State of Madras*[2] this Court understood this expression of opinion in the majority judgment as laying down the principle of territorial connection or nexus:—

"It admits of no dispute that a Provincial Legislature could not pass a taxation statute which would be binding on any other part of India outside the limits of the Province; but it would be quite competent to enact a legislation imposing taxes on transactions concluded outside the Province, provided that there was sufficient and a real territorial nexus between such transactions and the taxing Province. This principle, which is based upon the decision of the Judicial Committee in *Wallace Brothers & Company* v. *Commissioner of Income-tax, Bombay*[1] has been held by this Court to be applicable to sale tax legislation, in the recent decision in the *Bombay Sales Tax Act case*[3] and its propriety is beyond question. As a matter of fact, the legislative practice in regard to sale tax laws adopted by the Provincial Legislatures prior to the coming into force of the Constitution has been to authorise imposition of taxes on sales and purchases which were related in some manner with the taxing Province by reason of some of the ingredients of the transaction having taken place within the Province or by reason of the production or location of goods within it at the time when the transaction took place".

It may be observed that in the Bombay Sales Tax Appeal the question of the territorial connection or nexus was not directly in dispute and in *Poppatlal's case*[2] referred to above it was taken as decided by this Court in the Bombay Sales Tax Appeal that the theory of territorial connection or nexus was applicable to sales tax legislation. It is a moot point whether this theory of territorial connection or nexus which has been mainly applied in income-tax cases is also applicable to sales tax legislation, the spheres of an income-tax legislation and sales tax legislation being quite distinct. Whereas in the case of income-tax legislation the tax is levied either on a person who is within the territory by exercising jurisdiction over him *in personam* or upon income which has accrued or arisen to him or is deemed to have accrued or arisen to him or has been derived by him from sources within the territory and it is therefore germane to enquire whether any part of such income has accrued or arisen or has been derived from a source within the territory, in the case of sales-tax legislation it is the sale or purchase of goods which is the subject-matter of taxation and it cannot be predicated that the sale or purchase takes place at one or more places where the necessary ingredients of sale happen to be located. The theory of territorial connection or *nexus* was not put to the test at any time prior to the enactment of the Constitution and it is not necessary also for us to give a definite pronouncement on the subject. Suffice it to say that there was this evil which was rampant in the pre-Constitution period by reason of the various States fastening upon one or more ingredients of the sale and arrogating to themselves the power to tax sales or purchases of goods by reason of the territorial connection or *nexus* which they claimed to have with one or more of the ingredients of the sale provided however that a sale or purchase ultimately did take place either within their territories or anywhere else. It was this evil amongst others which was sought to be remedied by the Constitution-makers when they came to enact Article 286 of the Constitution.

1. (1948) F.C.R. 1: L.R. 75 I.A. 86: (1948) 2 M.L.J. 61 (P.C.).
2. (1953) S.C.R. 677: (1953) S.C.J. 369: (1953) 1 M.L.J. 739 (S.C.).
3. (1953) S.C.J. 373: (1953) 1 M.L.J. 743: (1953) 4 S.C.R. 1069 (S.C.).

The Constitution-makers enacted several provisions in Part XIII relating to trade, commerce and intercourse within the territory of India with an eye towards India as an economic unit and enacted in Article 301 that trade, commerce and intercourse throughout the territory of India shall be free and by Article 302 they empowered the Parliament to impose such restrictions on the freedom of trade, commerce and intercourse between one State and another or within any part of the territory of India as may be required in the public interest. Broad based on this conception of freedom of trade, commerce and intercourse throughout the territory of India and also with a view *inter alia* to relieve the consumer of the burden of multiple taxation which he was subjected to by the various State Legislatures by having resort to the territorial connection or *nexus* theory as aforesaid the Constitution-makers in Article 286 enacted restrictions on the power of the State Legislatures in regard to the imposition of tax on the sale or purchase of goods and these restrictions were fourfold:—

(1) State Legislatures were restrained from imposing a tax on the sale or purchase of goods where such sale or purchase took place outside the State;

(2) The State Legislatures were restrained from imposing a tax on the sale or purchase of goods where such sale or purchase took place in the course of the import of the goods into or export of the goods out of the territory of India;

(3) The State Legislatures were restrained from imposing a tax on the sale or purchase of any goods where such sale or purchase took place in the course of inter-State trade or commerce except in so far as the Parliament might by law otherwise provide; and

(4) The State Legislatures were restrained from imposing a tax on the sale or purchase of any such goods as had been declared by Parliament by law as essential for the life of the community unless such law had been reserved for the consideration of the President and had received his assent.

These were the four restrictions which were put upon the powers of the State Legislatures to impose a tax on the sales or purchases of goods and were imposed with different objectives in view.

The first restriction was devised to achieve the objective of relieving the consumer of the burden of multiple taxation and put it out of the power of a State to tax the sale or purchase of goods where such sale or purchase took place outside the State. The Sale of Goods Act contained several provisions which determined when a sale or purchase took place or in other words when the property in the goods sold passed from the seller to the purchaser. But it was silent in regard to the place where the sale or purchase took place. There was no rule of law enacted therein which determined the situs or location of such sale or purchase and resort was therefore had to the general law of the land for the purpose. The territorial connection or nexus theory had an eye over the various ingredients of a sale or purchase and if anyone or more of these ingredients fixed the situs or the location of the sale it would mean that a sale had more situses or locations than one. This state of affairs could not be allowed to continue any further having regard to the interests of the consumer and it was therefore thought necessary, when the State Legislatures were restrained from imposing a tax on sale or purchase of goods where such sale or purchase took place outside the State, also to determine when such sale or purchase could be said to take place outside the State. It was for this purpose that the Explanation to Article 286 (1) (*a*) was enacted and it was enacted for the express purpose therein mentioned, *viz.*, "for the purposes of sub-clause (*a*)". The Explanation was thus enacted for the express purpose of determining what sales or purchases could be said to have taken place outside the State and the basic idea which was adopted therein was that under the general law relating to Sale of

Goods property in the goods would by reason of such sale or purchase pass in a particular State which would therefore be the situs or location of such sale or purchase. But notwithstanding that fact the sale or purchase was deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purposes of consumption in that State. The anti-thesis appears to have been between the State in which the property in the goods has by reason of such sale or purchase passed and the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State and in the competition between these two States the Explanation provided that the sale or purchase in those circumstances shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption therein. This Explanation was interpreted in various ways, one view being that it defined an outside sale and went no further and that the situs of the sale was determined for the limited purpose of telling the State what it could not tax by telling it that in the cases covered by the Explanation in spite of the property in the goods having passed within its territories it was an outside sale *qua* that State. The other view was that besides fixing the situs of sale in this manner it also defined what was a sale or purchase which shall be deemed to have taken place in the delivery State and thus fulfilled a double function of investing only the delivery State with the power to tax such sale or purchase to the exclusion of all other States *qua* whom the sale or purchase was deemed to be an outside sale. The third view was that the Explanation was concerned with fixing the situs of sale in respect of the delivery State only and did not affect the power of the State in which the property in the goods had passed to tax such sale or purchase which it enjoyed by reason of the fact that the property in the goods had passed within its territories. A fourth possible view was that the only State which could not tax such sale or purchase on the ground that the sale was outside the State was the State in which the property in the goods had passed leaving open to the other States to tax such sales or purchases by having resort to the power which they possessed under Article 246 (3) and Entry 54 of List II of the Seventh Schedule to the Constitution. Whatever be the correct view to take of this Explanation one fact remained that Article 286 (1) (*a*) and the Explanation thereto were enacted with the one and only motive to relieve the consumer of the burden of multiple taxation to which he was subjected by having resort to the territorial connection or nexus theory and to replace the nexus theory by what may be described as the situs theory fixing the situs or the location of the sale or purchase and putting a restriction on the taxing power of the States *qua* which it could be predicated that such sale or purchase took place outside the State, thus leaving only one State in which the goods have been actually delivered as a direct result of such sale or purchase for the purpose of consumption therein free to tax the sale or purchase having resort to the powers vested in the State Legislature by Article 246 (3) and Entry 54 of List II of the Seventh Schedule to the Constitution.

If therefore the situs or location of the sale was laid down as the criterion of the taxing power of the State the *non-obstante* clause contained in the Explanation gave the clue as to what was in mind of the Constitution-makers when they substituted the situs theory in place of the nexus theory which theretofore prevailed. They took cognisance of the general law relating to the sale of goods under which the property in the goods passed by reason of such sale or purchase. The conception of the transfer of ownership of the goods by the seller to the purchaser was thus accepted by them as determining the situs or location of the sale or purchase and this conception had its roots in the relevant provisions of the Sale of Goods Acts both in India and in England and in spite of the fact that those provisions did not in terms say where the sale took place or the transfer of ownership came about or the property in the goods passed by reason

of such sale or purchase, the general law relating to sale of goods was taken in the Explanation to fix the situs or location of such sale or purchase within the territories of a particular State and that event could only take place in one State and not in more States than one. There could be only one situs or location of the sale or purchase and if that were so the State in whose territories such sale or purchase took place or in which the property in the goods passed by reason of such sale or purchase was the State which could claim the power to tax such sale or purchase by reason of its having taken place within its territory. It would therefore appear that the Constitution-makers had in enacting the Explanation the one and only motive of negativing the territorial connection or nexus theory and replacing it by the situs theory and fixing the situs or location of the sale or purchase within the State in which the property in the goods passed by reason of such sale or purchase. While doing so they also created a legal fiction whereby in the competition between what may be called the title State and the delivery State the delivery State was given the power to impose a tax on sale or purchase of goods where the goods had actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State. If the object to be achieved was the relief of the consumer from the burden of multiple taxation that object could only be achieved by subjecting him to taxation at the instance of one State only and not by more States than one and to that extent the view that both the title State and the delivery State would be entitled to impose the tax on the sale or purchase falling within the Explanation was clearly erroneous, the only State which would be in a position to tax the sale or purchase in question being the State in which the goods had been actually delivered as a direct result of such sale or purchase for the purpose of consumption therein.

The second restriction on the taxing power of the State Legislatures was devised to safeguard the import and export trade of the country and embraced transactions of sale or purchase of goods where such sales or purchases took place in the course of the import of the goods into or export of the goods out of the territory of India, *vide* Article 286 (1) (*b*). It is significant to observe that the Explanation to Article 286 (1) (*a*) was definitely put for the purposes of sub-clause (*a*) and it had therefore no application to the cases which were covered by Article 286 (1) (*b*). This concept was quite distinct from the concept which was dealt with in Article 286 (1) (*a*). The sales or purchases were looked at from different view-points and the particular aspect which was dealt with in Article 286 (1) (*b*) was the import-export aspect of the transactions of sales or purchases. That aspect was separately dealt with even though for the sake of economy of words the provisions in regard thereto were incorporated in Article 286 (1). They had nothing in common with the provision contained in Article 286 (1) (*a*).

The third restriction was devised to protect inter-State trade or commerce and covered transactions of sale or purchase of any goods where such sale or purchase took place in the course of inter-State trade or commerce except in so far as Parliament might by law otherwise provide. This was still another view-point and this restriction was put with a view to safeguard the freedom of trade, commerce and intercourse throughout the territory of India. The imposition of this restriction meant that the States would be deprived of a large part of their income which they used to derive from taxing sales or purchases falling within this category before the commencement of the Constitution. A proviso was therefore enacted that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of the Constitution shall, notwithstanding that the imposition of such tax is contrary to the provisions of Article 286 (2), continue to be levied until the thirty-first day of March, 1951. This proviso enabled the State Governments to levy the taxes

which they used to levy before the commencement of the Constitution up to the 31st March, 1951 within which period they were expected to adjust their economies and replenish their treasuries by having resort to their legitimate powers of taxation. By the 31st March, 1951, the States could also make representations to the Centre and induce the Parliament to otherwise provide by appropriate legislation within the meaning of Article 286 (2) and authorise them to impose taxes on the sale or purchase of any goods where such sales or purchases took place in the course of inter-State trade or commerce. But until that ban was lifted by appropriate legislation by the Parliament the ban imposed under Article 286 (2) was absolute and no transaction of sale or purchase of goods where such sale or purchase took place in the course of inter-State trade or commerce could ever be made the subject-matter of taxation at the instance of a State Legislature. The Explanation to Article 286 (1) (*a*) being expressly for the purpose of sub-clause (*a*), *i.e.*, for the purpose of determining what transaction of sale or purchase was outside the State or inside the State as above stated could not be read into Article 286 (2) nor could it be read as an exception or proviso to Article 286 (2). Reading it as such exception or proviso would be contrary to the express terms of the Explanation and would also stultify the purpose of the enactment of Article 286 (2) thus taking a large slice out of the transactions falling within that category. The rule as to the exclusion of the general provision by a special provision would also not apply for the simple reason that the object of Article 286 (1) (*a*) and the Explanation thereto is quite distinct from the object of Article 286 (2) and the objects being quite different these provisions do not cover the same subject-matter and therefore there would be no occasion for the application of that rule of construction. To this extent the view taken by me in the Bombay Sales Tax Appeal[1] that the Explanation to Article 286 (1) (*a*) was an exception or proviso to Article 286 (2) was clearly erroneous.

The last restriction on the taxing powers of the State Legislatures was devised to maintain the supply of essential commodities and related to the imposition of a tax on the sale or purchase of any goods as have been declared by Parliament by law to be essential for the life of the community unless such law has been reserved for the consideration of the President and has received his assent. This restriction also though of another nature was a restriction put on the power of the State Legislatures to tax such transactions of sale or purchase and was absolute in terms having nothing whatever to do with the restrictions put in the earlier clauses of Article 286. These transactions comprised a distinct category by themselves and were not affected by the restrictions put in the earlier clauses of the Article. It may be noted that the transactions covered by Article 286 (1) (*a*), Article 286 (2) and Article 286 (3) though looked at from different view-points may overlap. A transaction which is covered by Article 286 (1) (*a*) may also be covered by Article 286 (2) and both these sets of transactions may be covered by Article 286 (3). Such overlapping would not necessarily mean that the provisions of one particular clause have to be read as fastening upon the transactions falling within the category comprised therein and treating them as lifted out of the ban sought to be imposed by the other clauses of the Article. Each ban has got to be effective and imposed on the transactions falling within its ambit and even though the transaction may be saved out of the ban imposed in one particular clause it may just as well fall within the ban imposed in another clause and thus be excluded from the taxing power of the State Legislatures. It cannot therefore be urged that the Explanation to Article 286 (1) (*a*) lifts the transaction out of the ban imposed by Article 286 (2) or by Article 286 (3) and leaves such transaction of sale or purchase as is covered by the Explanation free to be taxed by the delivery State in spite

1. (1953) S.C.J. 373 : (1953) 1 M.L.J. 743 : (1953) 4 S.C.R. 1069 (S.C.).

of the same being of an inter-State character or being in regard to goods declared by Parliament by law to be essential for the life of the community.

The whole scheme of Article 286 is that four different restrictions are put on the taxing power of the State Legislatures in regard to the sales or purchases of goods and each one of these restrictions has got to be considered separately by itself and it is only those transactions of sale or purchase which do not fall within any of those categories that can be taxed by the State Legislatures by having resort to their powers under Article 246 (3) and Entry 54 of List II of the Seventh Schedule to the Constitution.

The learned Government Advocate for Bihar however urged five distinct reasons why Article 286 (2) cannot apply to the trnsaction of sale or purchase covered by Article 286 (1) (*a*) and the Explanation thereto and they were:—

(1) The class of sales falling under Article 286 (1) (*a*) form a special class of inter-State sales which on general principles ought not to be affected by the general provisions of Article 286 (2);

(2) If Article 286 (2) applies to the class of sales covered by Article 286 (1) (*a*) and the Explanation thereto it would result in discrimination against local trade in favour of inter-State trade and it will be inconsistent with the provisions of Part XIII of the Constitution;

(3) The purpose of Article 286 being to eliminate multiple taxation and Article 286 (1) (*a*) having already achieved that purpose with regard to the class of sales falling within it, it was no longer necessary for that purpose to apply Article 286 (2) to that class of sales;

(4) The Constitution itself has divided inter-State sales into two categories and in relation to one class it has itself provided which State will tax and under what conditions and in relation to the other class the Constitution itself has imposed a ban in general terms and granted Parliament power in general terms again to relax that ban as and when Parliament thinks fit; and

(5) By a legal fiction, the inter-State sale is converted into an intra-State sale.

We shall deal with these reasons seriatim:

As to reason (1): it was submitted that the transactions of sale covered by Article 286 (1) (*a*) and the Explanation thereto and the transactions of sale covered by Article 286 (2) were of the same category and both these provisions dealt with the same topic. That being so, Article 286 (2) contained a general provision whereas Article 286 (1) (*a*) and the Explanation thereto contained a special provision having reference to the transactions of sale or purchase falling within that category, with the result that the rule of harmonious construction applied and the special provision was to be read as an exception to the general provision. This argument found favour with the High Court below as well as myself in the Bombay Sales Tax Appeal.[1] This rule of harmonious construction no doubt would apply if the topics covered by both these provisions were the same and the subject-matters dealt with in both these provisions were identical. There is this difference however between the two provisions, *viz*., that the transactions covered by both do not fall within the same category and a transacion of sale which is looked at from the point of view of its being an outside or an inside sale may just as well be a sale in the course of inter-State trade or commerce. In Article 286 (1) (*a*) the transaction is looked at from the point of view of its situs or location and in Article 286 (2) it is looked at from the point of view of its being in the course of inter-State trade or commerce and

1. (1953) S.C.J. 373 : (1953) 1 M.L.J. 743 : (1953) 4 S.C.R. 1069 (S.C.).

the two approaches are quiet distinct one from the other. That being so it cannot be said that the topics which are dealt with by both these provisions are the same or that the subject-matters thereof are identical. The ban which is imposed by Article 286 (1) (*a*) and the rule of harmonious construction and the exception of the special provisions from the general one as indicated above would have no application in the matter of the construction of both these provisions.

As to reason (2): there is no question of discrimination against local trade in favour of inter-State trade if Article 286 (2) applied to the class of sales covered by Article 286 (1) (*a*) and the Explanation thereto. The local trade would certainly be liable to the levy of intra-State sales tax which could be avoided if a transaction takes place in the course of inter-State trade or commerce. For the working of the Union as an economic unit and for the free flow of trade, commerce and intercourse throughout the territory of India it is necessary that no fetter should be placed on the course of inter-State trade or commerce. The consumers within a State who would resort to transactions of purchase across the border with a view to avoid the payment of the intra-State sales tax would be comparatively few and could in conceivable cases be caught within the net by imposing a tax on goods of a non-discriminatory nature within the meaning of Aricle 304 (*a*). This reason is therefore no deterrent to our holding that the ban under Article 286 (2) is absolute and unaffected by Article 286 (1) (*a*) and the Explanation thereto.

As to reason (3): it postulates that the only purpose of the enactment of Article 286 (1) (*a*) and the Explanation thereto is to eliminate multiple taxation. If that was the only purpose of the Article it might conceivably be argued that once that purpose is achieved in regard to the particular set of transactions which are covered by Article 286 (1) (*a*) and the Explanation thereto there is no further need of putting any ban under Article 286 (2). As has been already observed before, the purposes of the enactment of Article 286 were manifold and they were achieved by enacting the four distinct provisions in the manner indicated above and the restrictions which were put on the powers of the State Legislatures to tax transactions of sale or purchase were mutually exclusive even though the transactions might so far as their nature and character be concerned overlap in certain events. Even though therefore a transaction fell within the ban of Article 286 (1) (*a*) it could nonetheless be subjected to the ban which was imposed by Article 286 (2) and it could be taxed only if it survived this scrutiny also, which could be done if the Parliament by law otherwise provided as set out in Article 286 (2).

As to reason (4): it assumes that the Constitution itself has divided transactions of sale or purchase in the course of inter-State trade and commerce into two distinct categories, one falling within Article 286 (1) (*a*) and the Explanation thereto and the other falling within Article 286 (2). There is no warrant for holding that transactions in the course of inter-State trade or commerce are divided into such distinct categories for the purpose of the imposition of the ban. .The transaction of sale or purchase would be one but it is subject to the imposition of distinct bans having regard to the view-point from which it is being looked at. If it is looked at from the view-point of its being an outside or an inside sale it may be caught within the ban of Article 286 (1) (*a*). If it is looked at from the view-point of its being a transaction in the course of inter-State trade or commerce it may be caught within the ban imposed by Article 286 (2 . These bans are mutually exclusive and may have to be applied to the same transaction of sale or purchase, one ban not necessarily excluding the other.

As to reason (5): the argument totally ignores the purpose and efficacy of a legal fiction. A legal fiction pre-supposes the correctness of the state of facts on which it is based and all the consequences which flow from that state of facts have got to be worked out to their logical extent. But due regard must be had in this behalf to the purpose for which the legal fiction has been created. If the purpose of this legal fiction contained in the Explanation to Article 286 (1) (*a*) is solely for the purpose of sub-clause (*a*) as expressly stated it would not be legitimate to travel beyond the scope of that purpose and read into the provision any other purpose howsoever attractive it may be. The legal fiction which was created here was only for the purpose of determining whether a particular sale was an outside sale or one which could be deemed to have taken place inside the State and that was the only scope of the provision. It would be an illegitimate extension of the purpose of the legal fiction to say that it was also created for the purpose of converting the inter-State character of the transaction into an intra-State one. This type of conversion could not have been in the contemplation of the Constitution-makers and is contrary to the express purpose for which the legal fiction was created as set out in the Explanation to Articles 286 (1) (*a*).

All these reasons therefore taken individually or collectively are not sufficient to negative the position that the transactions covered by Article 286 (1) (*a*) and the Explanation thereto are not excluded from the operation of Article 286 (2) and that the ban under Article 286 (2) also applies to the same.

It was also urged that this construction put upon Article 286 (1) (*a*) and the Explanation thereto and Article 286 (2) would render the Explanation nugatory and that the Constitution-makers at the very commencement of the Constitution would not have given the power by one hand and taken it away by the other and that therefore the Explanation to Article 286 (1) (*a*) should be read as an exception or a proviso to Article 286 (2). This argument no doubt found favour with me in the Bombay Sales Tax Appeal[1] and also with the High Court below. If due regard however is had to the purpose of the enactment of Article 286 as a whole and also to the various considerations which have been set out herein above it is clear that this argument is untenable. The transactions of sale and purchase covered by the Explanation to Article 286 (1) (*a*) are not necessarily co-extensive or conterminous with the transactions of sale or purchase covered by Article 286 (2). There are transactions which would be covered by the Explanation to Article 286 (1) (*a*) without their being transactions of sale and purchase covered by the Explanation to Article 286 (1) and which therefore would without anything more be covered by the Explanation and would be the subject-matter of taxation by the delivery State by the appropriate exercise of its power of taxation. There is also a further fact to be noted and it is that even though the transactions covered by both these provisions may be coceivably co-extensive or conterminous with each other, the Explanation to Article 286 (1) (*a*) would come into operation the moment the ban of Article 286 (2) was lifted by an otherwise provision enacted by Parliament and it was certainly lifted up to the 31st March, 1951, by the President directing the continuance of the operation of the sales tax laws which peviously existed in the various States. It could not therefore be stated that the construction put upon Article 286 (1) (*a*) and the Explanation thereto and Article 286 (2) as above would render the Explanation nugatory. If the States thought that the operation of the ban under Article 286 (2) prevented them from taxing transactions of sale or purchase which take place in the course of inter-State trade and commerce and which are also covered by the Explanation to

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1 (1953) S.C.J. 373 : (1953) 1 M.L.J. 743 : (1953) 4 S.C.R. 1069 (S.C.).

Article 286 (1) (*a*) it was open to them to adopt proper measures for lifting the ban under Article 286 (2) and making themselves free to tax the transactions of sale or purchase covered by the Explanation. Parliament would in that event consider the proposals made by the respective States in their proper perspective having regard to the provisions of the Constitution in regard to the freedom of trade, commerce and intercourse throughout the territory of India, the convenience or inconvenience of the public and the needs of the respective States and lift the ban in the manner and to the extent it thought fit.

The majority judgment in the Bombay Sales Tax Appeal[1] has been construed by the various States giving them an authority to impose a tax on the transactions of sale or purchase covered by the Explanation to Article 286 (1) (*a*) and authorising them to impose such tax on the seller even though he may be residing outside their territories. The non-resident businessmen therefore who entered into transactions of sales of goods where as a direct result of such sales the goods are actually delivered for the purpose of consumption in a particular State have been sought to be subjected to the levy of sales tax at the instance of these States with great inconvenience and harassment to themselves, and the warrant for their action in this behalf is stated by these States to be the majority judgment of this Court. The various States however in the scramble for taxes have been oblivious to the fact that a transaction of sale or purchase is not a unilateral transaction but a bilateral one and when it is looked at from the point of view of a sale or purchase it is one transaction which has two facets. From the point of view of a seller it is a sale transaction and from the point of view of a purchaser it is a purchase transaction. When therefore the transaction is one on which a tax on sale or purchase can be levied it does not necessarily mean that only a sales tax can be levied and not a purchase tax. The inside dealer may therefore be taxed on his purchases or if he sells in retail to actual consumers in the State he may be taxed on the sales. If the inside dealer is himself the consumer then there will be no difficulty in assessing him for his books will show how much he has imported from other States and how much he has consumed. In any case, the convenience or inconvenience of collecting a sales tax or a purchase tax is not a relevant consideration when one is considering the validity or otherwise of such a tax, as was observed by Kania, C.J., in the case of *A. H. Wadia* v. *Commissioner of Income-tax, Bombay*[2] at p. 141. In the very judgment of the majority in the Bombay Sales Tax Appeal[1] there is a passage at p. 1084 which indicates that all buyers within the deelivery State except those buying for re-export out of the State would be within the scope of the Explanation and liable to be taxed by the State on such transactions, and it would be an unwarranted assumption on the part of anyone who read that judgment to say that the delivery State was entitled to levy a tax on the sale or purchase of goods falling within the Explanation to Article 286 (1) (*a*) on the seller alone. The seller would be outside the territories of the taxing State and would primarily not be liable to the jurisdiction of the Sales Tax enacted by the taxing State. It would be by adopting the theory of the territorial connection or nexus as it was being done prior to the enactment of the Constitu-that the taxing State would seek to reach the non-resident businessmen outside its territories and if regard be had to the fact that the taxation is either in *personam* or in relation to the transaction of sale or purchase which takes place within its territories there is no warrant at all for taxing the outside businessmen on the transactions of sale or purchase covered by the Explanation to Article 286 (1) (*a*). All the provisions contained in the Bihar Sales Tax Act with regard to the registration of the outside dealer, the maintenance of the books of

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1. (1953) S.C.J. 373 : (1953) M.L.J. 743 : (1953) 4 S.C.R. 1069 (S.C.).

2. (1948) (F.C.R. 121 : (1949) 1 M.L.J. 335.

account, submission of returns by him to the sales tax authorities of the State of Bihar, the production and inspection of books of account before the sales tax authorities, the search of the premises of the outside dealer by them and the imposition of penalties on him by reason of his non-compliance with the various provisions contained in the Act amongst others are unwarranted and illegitimate exercise of the powers incidental to the power of taxing sales or purchases conferred upon the State of Bihar by Article 246 (3) and the Entry 54 in List II of the Seventh Schedule to the Constitution and do not affect non-resident businessmen who are outside the territories of the State of Bihar.

The majority judgment in the *Bombay Sales Tax Appeal*[1] did not say that the delivery State was entitled to tax the sellers in the transactions of sale or purchase covered by the Explanation to Article 286 (1) (*a*). The question whether the seller or the purchaser would be subject to the levy of a tax on the transaction of sale or purchase at the instance of the delivery State was not before the Court and the observations contained in the majority judgment were made with reference to a pure question of the interpretation of Article 286 (1) (*a*) and the Explanation thereto. As a matter of fact the passage above-quoted from the judgment[1] at p. 1084 would go to show that they contemplated the purchasers being amenable to tax at the instance of the delivery State in the case of transactions covered by the Explanation to Article 286 (1) (*a*). Even though it is not strictly relevant to consider the consequences of a particular position in law when construing a statutory provision it is nonetheless necessary to visualise those consequences when one tries to probe into the mind of the legislators and see whether they could have ever contemplated such consequences. If the construction sought to be put upon the Explanation to Article 286 (1) (*a*) and the majority judgment in relation thereto by the State Legislatures were accepted, all outside dealers wheresoever they may be located or residing or carrying on their business all over the Union would be amenable to the levy of sales tax at the instance of the delivery State and one dealer in a particular State who had a very large business and was entering into transactions of sale with consumers in outside States all over the Union would be amenable to the jurisdiction of several States in the matter of his transactions of sale of his goods. There are as many as 21 Sales Tax Acts to be found in the Manual of Sales Tax Acts and if a dealer in one State was going to be held amenable to the levy of sales tax at the instance of all the other States it would mean that he would have to ascertain from the purchaser in each of the transactions of sale which he enters into the State to which the purchaser belongs, whether the purchaser is purchasing the goods for the purpose of consumption within that State, to get himself registered as a dealer in that State, to maintain his books of account with a view to produce them and subject them to inspection by the sales tax authorities in that State, to submit returns of the sales tax recovered by him from the purchasers in that State before the sales tax authorities of that State and make himself liable for the non-observance of the various requirements of the Sales Tax Act enacted by that State. The task of fulfilling the requirements *qua* one State would be formidable enough. But when one visualises that the dealer who enters into such transactions of sale with the various customers may be subjected to this process at the instance of each and every State within whose territory the purchaser may happen to be importing the goods as a direct result of such sale for actual consumption within the territories of that State, one can easily understand what untold harassment and inconvenience the dealer would have to suffer from. It will be easy to understand that if those were the circumstances attendant upon his business the dealer may as well close down his business rather than submit to

1. (1953) S.C.J. 373 : (1953) 1 M.L.J. 743 : 1953 S.C.R. 1069 (S.C.).

all this harassment at the hands of the various States. The free flow of trade, commerce and intercourse throughout the territory of India will be thoroughly choked up and we are quite sure that neither the Constitution-makers nor the majority judgment in the *Bombay Sales Tax Appeal*[1] would ever have contemplated these consequences. It is legitimate therefore to hold that no such thing could ever have been contemplated by them and nothing would have been farthest from their minds than such a position. The seller in such cases would certainly not be amenable to the levy of a sales tax at the instance of the delivery State and no law passed by the delivery State in regard to a levy of sales tax would have any operation against the non-resident businessman who enters into a transaction of sale where as a direct result of such sale the goods are actually delivered for consumption within the taxing State.

If however the majority judgment be construed to have said that the seller could be subjected to the levy of a sales tax at the instance of the delivery State in the case of transactions covered by the Explanation to Article 286 (1) (*a*) I am of the opinion that it was clearly erroneous and public interests demand that the same should be reversed.

After further and fuller consideration of the matter in the light of the very elaborate arguments which have been addressed before us by the learned Counsel for the Appellants and the Respondents and also the Interveners, I feel that the conclusion reached in the *Bombay Sales Tax Appeal*[1] needs to be revised and I am of the opinion that Article 286 (2) puts an absolute restriction on the taxing power of the States where transactions of sale or purchase take place in the course of inter-State trade or commerce unless and until the ban is lifted by Parliament within the terms thereof and until such ban is lifted no delivery State within the meaning of the Explanation to Article 286 (1) (*a*) much less the other States are in a position to impose a tax on transactions of sale or purchase covered by the Explanation.

The appeal should therefore be allowed and a direction should issue against the State of Bihar to refrain from taxing the sales or purchases of goods which take place in the course of inter-State trade or commerce even though the goods as a direct result of such sale or purchase are actually delivered in Bihar for consumption in that State until Parliament otherwise provides within the meaning of that expression in Article 286 (2). The Appellant should get its costs throughout from the State of Bihar, the rest of the parties appearing before us to bear and pay their respective costs of this appeal.

Jagannadhadas, J.—The first, and to my mind, the most important, point that requires careful consideration in this case is whether, and if so within what limits, this Court will observe the rule as to the binding character of a judicial precedent with reference to its own prior decisions. Admittedly the question that has been raised in this case as to the construction of Article 286 of the Constitution is one that is directly covered by a recent decision of this Court in the *State of Bombay* v. *The United Motors (India) Ltd.*[1] The rule as to the binding character of judicial precedents is one which is normally accepted by all the Courts which function on the pattern of the British Judicial system. This rule, in its very strict form, is observed by the English Courts. (Vide *Young* v. *Bristol Aeroplane Co., Ltd.*[2], and *Williams* v. *Glasbrook Brothers Ltd.*[3] The House of Lords has ruled, after careful consideration, in its judgment in the case in *London Street Tramways Co., Ltd.* v. *London County Council*,[4] that the House is bound to follow its own previous decisions and will not

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1. (1953) S.C.J. 373: (1953) 1 M.L.J. 743: 1953 S.C.R. 1069 (S.C.).
2. L.R. (1944) K.B. 718.
3. (1947) 2 All E.R. 884.
4. L.R. (1898) A.C. 375.

allow any question settled thereby to be reopened and argued again, nor can the House be asked to reverse its own prior decision. Such reversal, if needed, is one that has to be brought about by parliamentary legislation. The Judicial Committee of the Privy Council has, however, not adopted this extremely rigorous view but has felt itself free, in appropriate cases, to reconsider its prior decisions. (Vide In Re *Transferred Civil Servants (Ireland) Compensation*.[1] The same is the case with the Supreme Court of the United States of America. (*See* Willoughby on the Constitution of the United States, Vol. I, page 74). Our Constitution which has made detailed provision about various matters relating to the Supreme Court including a matter relating to its practice, such as, whether there can be a dissenting judgment (see Article 145 (5)) has not, in terms, made any provision in this behalf. Article 141, no doubt, provides that "the law declared by the Supreme Court shall be binding on all Courts within the territory of India." It has been urged before us that the phrase "all Courts" is comprehensive enough to include the Supreme Court. It is pointed out, that since every decision declares the law, a later decision declaring the law in a contrary sense, would in effect, be the exercise of legislative function which must be taken to have been impliedly prohibited. While these arguments are not without force, it is reasonably clear, in the context of Article 141, that the phrase "all Courts" must refer to Courts other than the Supreme Court. In the absence, therefore, of any clear provision in the Constitution and in view of the fact that this Court has historically succeeded to the pre-existing Federal Court and the Judicial Committee of the Privy Council, we cannot deny to this Court, the competence to reconsider its prior decisions.

But, it does not follow that such power can be exercised without restriction or limitation or that a prior decision can be reversed on the ground that, on later consideration, the Court disagrees with the prior decision and thinks it erroneous. The necessity for certainty and continuity in the declaration of law by the highest Courts in the country is recognised on all hands. That necessity is all the greater, and not the less, by reason of the Constitution itself having formally provided that the decisions of this Court are declaratory of the law. The rule as to the binding character of a judicial precedent is based on a juristic principle of universal application. The reason for its adoption is, "the disastrous inconvenience of subjecting each question decided by a previous judgment to reargument, thereby rendering the dealings of mankind doubtful by different decisions; so that in truth and in fact there would be no real final court of appeal" (See *London Street Tramways Co. Ltd.* v. *The London County Council*,[2] at page 380). It is, therefore, necessary to consider within what limits the competency of this Court to reconsider its prior decisions may well be exercised. For this purpose the actual practice of other comparable Courts as affording guidance requires close examination.

The practice of the Supreme Court of America is indicated in the following passage from Willoughby on the Constitution of the United States of America, Volume I, page 74:

> "In cases of purely private import, the chief desideratum is that the law remain certain, and, therefore, where a rule has been judicially declared and private rights created thereunder, the courts will not, except in the clearest cases of error, depart from the doctrine of *stare decisis*. When, however, public interests are involved, and especially when the question is one of constitutional construction, the matter is otherwise. An error in the construction of a statute may easily be corrected by a legislative act, but a Constitution and particularly the Federal Constitution, may be changed only with great difficulty. Hence

1. L.R. (1929) A.C. 242.
2. L.R. (1898) A.C. 375.

an error in its interpretation may for all practical purposes be corrected only by the Court's repudiating or modifying its former decision".

It would appear, therefore, that the power of reconsideration of a prior decision is somewhat freely exercised by the Supreme Court of America in Constitutional cases. The reason for such free exercise, or to the same extent, does not exist under our Constitution. To appreciate this, it is necessary to compare the provisions in the two Constitutions for amendment of the Constitution. The machinery for amendment of the Constitution of the United States is provided in Article V thereof and is as follows:

> "The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of two thirds of the several States shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress".

Under Article 368 of our Constitution, the normal procedure provided for amendment, except in respect of specified matters to be presently enumerated, is as follows:

> "An amendment of this Constitution may be initiated by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill"

In respect, however, of a limited number of matters specified in the Constitution, an additional step is required, namely, that "before the Bill making provision for such amendment is presented to the President for assent, the amendment shall also required to be ratified by the Legislatures of not less than one-half of the States specified in Parts A and B of the First Schedule by resolutions to that effect passed by those Legislatures". Now the special matters where amendment is conditional on this additional requirement relate to the election of President (Articles 54 and 55), extent of the executive power of the Union (Article 73), extent of the executive power of a State (Article 162), provisions relating to the Union Judiciary (Supreme Court) (Chapter IV of Part V), and to the High Courts of the various States, in Parts A and B (Chapter V of Part VI) and in Part C (Article 241), and the relations between the Union and the States (Chapter I of Part XI), as also the distribution of the legislative powers and the various lists in the Seventh Schedule, the representation of the States in Parliament, and the provision in the Constitution relating to the machinery for amendment of the Constitution. Thus, it will be seen, excepting in respect of a few basic matters—of which it may be noticed Article 286 is *not* one—the normal machinery for the procedure of amendment is the same as that for the passing of any statute by Parliament except that a specified majority in each of the Houses is essential, the securing of which would be difficult or easy according to the strength of the Government at the time in each of the Houses. The requirement of special majority as a condition for the passing of legislation in respect of certain specified items of business is not altogether an unknown feature. However that may be, it is quite clear that while the amendment of the Constitution does not depend upon the ordinary majority rule under which Parliament conducts its business, the machinery therefor is by invoking the very same Parliament and not anything so difficult, cumbrous and dilatory as that envisaged in Article V of the American Constitution. Even as regards the few specified matters for which an additional requirement of ratification by State Legislatures is provided for, our machinery for amendment is clearly much easier and less cumbersome. It does not appear to me, therefore, right to rely upon the American practice as a safe guide to determine our

practice on the question as to the binding character of a judicial precedent. Neither, are we bound to adopt the very rigid rule which the House of Lords has formulated for its own practice. The problem of interpreting a written Constitution does not generally arise before it.

The only other comparable Courts whose practice has been brought to our notice, through citation of cases, are Judicial Committee of the Privy Council and the High Court of Australia. As this is the first case in this Court wherein this question arises, it is desirable to consider that practice carefully for our guidance, though it is not necessary to lay down any absolutely rigid or inelastic formula. It is worthwhile at this stage to notice what, according to the Constitution of Australia, is the machinery for the alteration of their Constitution. This is to be gathered from section 128 of the Commonwealth Act of 1900 which—broadly speaking—shows that what is required there is an absolute majority in each of the Houses and the approval of each State to be obtained by a referendum to the electors of each State. This is definitely much more difficult, cumbersome and dilatory than what obtains in our Constitution. Therefore, there can be no reason for our adopting a less rigid standard than that adopted by the High Court of Commonwealth of Australia, nor is there any reason for our adopting a standard less rigid than that of the Judicial Committee of the Privy Council, who while feeling themselves free not to follow the very strict rule of the House of Lords, were under no constitutional limitations in this behalf.

The practice of the Judicial Committee as to the limits within which they generally exercise the freedom to reconsider their prior decisions can be gathered from the cases in In Re. *Transferred Civil Servants (Ireland) Compensation*[1]; *Attorney-General for Ontario* v. *Canada Temperance Federation*[2]; and *Phanindra Chandra Neogy* v. *The King*[3]. The matter was discussed elaborately and various prior decisions of the Privy Council were considered and the conclusion was summed up as follows in In Re. *Transferred Civil Servants (Ireland) Compensation*[1]:

> "There is no inherent incompetency in ordering rehearing of a case already decided by the Board, even when a question of a right of property is involved but such an indulgence will be granted *in very exceptional circumstances only. It is of the nature of an extra-ordinarium remedium*".

After the above formulation of their practice, the Privy Council in this case permitted itself to reconsider the previous decision in *Wigg's case*[4], on two grounds. (1) The case came up before them on a reference under section 4 of the Judicial Committee Act of 1933, and that reference would have been futile if it did not necessarily involve such reconsideration. (2) The reference itself was granted on account of an alleged material mistake of fact, into which the previous Board of the Judicial Committee had fallen. On such reconsideration the previous decision was affirmed. In *Attorney-General for Ontario* v. *Canada Temperance federation*[2] the Judicial Committee expressed itself as follows at page 206:

> "The appellants' first contenton is that *Russell's case*[5] was wrongly decided and ought to be overruled. Their Lordships do not doubt that in tendering humble advice to His Majesty they are not absolutely bound by previous decisions of the Board, as is the House of Lords by its own judgments. In ecclesiastical appeals, for instance on more than one occasion, the Board has tendered advice contrary to that given in a previous case, which further historical research has shown to have been wrong. *But on constitutional questions it must be seldom indeed* that the Board would depart from a previous decision which it may be assumed will have been acted on both by Governments and subjects".

1. L.R. (1 29) A.C 242.
2. L.R. 1946) A.C. 193.
3. (1948) L.R. 76 I.A. 10 : (1949) 1 M. L.J. 177 (P C.).
4. L.R (1927) A.C. 674.
5. L.R. (1882) 7 A.C. 829.

In this case the Privy Council was invited to reconsider the correctness of the law laid down by them in *Russell* v. *The Queen*,[1] but they declined to do so on two grounds, *viz.*, (1) on constitutional questions the Board seldom departs from its previous decisions, and (2) the prior decision stood unchallenged for over 60 years.

In *Phanindra Chandra Neogy* v. *The King*,[2] the Privy Council stated that it is only "in the most exceptional cases" that they would tender advice to His Majesty inconsistent with a previous decision and reaffirmed the decision in *Gill's case*.[3]

Three cases of the High Court of Australia out of those brought to our notice are instructive. In the *Tramways case*,[4] the position was expressed in the following terms. Griffith, C.J., observed as follows:

"In my opinion it is impossible to maintain as an abstract proposition that the Court is either legally or technically bound by previous decisions. Indeed it may, in a proper case, be its duty to disregard them. But the rule should be applied with great caution, and only when the previous decision is *manifestly wrong*, as, for instance, if it proceeded upon the mistaken assumption of the continuance of a repealed or expired statute, or is contrary to a decision of another Court which this Court is bound to follow; *not*, I think upon a mere suggestion that some or all of the members of the later Court might arrive at a different conclusion if the matter were *res integra*. Otherwise there would be grave danger of want of continuity in the interpretation of the law".

Justice Barton observed as follows:

"I have never thought that it was not open to this Court to review its previous decisions upon good cause. The question is not whether the Court can do so, but whether it will, having due regard to the need for continuity and consistency in judicial decisions. Changes in the number of appointed Justices can, I take it, never of themselves furnish a reason for review. . . . . . But the Court can always listen to argument as to whether it ought to review a particular decision, and *the strongest reason for an overruling is that a decision is manifestly wrong, and its maintenance is injurious to the public interest*".

Having so laid down the rule of practice for their Court, the learned Judges, on account of the special circumstances in that case, unanimously agreed to reconsider the prior decision and on such reconsideration affirmed it. In so reaffirming the prior decision, one of the learned Judges, Justice Powers, stated his grounds to the following effect:

"In *Whybrow's case*[5], the Court consisted of all the Justices of this Court who could sit on the application. The case was very fully argued. Both parties and two of the States were represented by counsel. The judgments were considered judgments delivered more than two weeks after the preliminary objection was taken. . . . . . . Under the circumstances I have no hesitation in following the judgment".

The same learned Judge at another portion of his judgment stated as follows:

"If we do not show some respect to our own Court's decisions, no counsel will feel safe in advising the public, and it will create uncertainty and confusion".

The principles so laid down have been reiterated in a recent case of the High Court of Australia in *Perpetual Executors and Trustees Association of Australia, Ltd.* v. *Federal Commissioner of Taxation*,[6] in the following terms:

"The Court is not bound by its previous decisions so as absolutely to preclude reconsideration of a principle approved and applied in a prior case, but, as was stated in *Cain* v. *Malone*[7], the exceptions to the rule are exceptions which should be allowed only with great caution and in clear cases".

Then the above quotation from the judgment of Justice Barton in the *Tramways Case*,[4] was repeated and the principle indicated therein was reaffirmed.

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1. L.R. (1882) 7 A.C. 829
2. L.R. (1948) 76 I.A. 10 : (1949) 1 M.L.J. 177 (P.C.).
3. (1948) L.R. 76 I.A. 41 : (1949) 2 M.L.J. 124 (P.C.).
4. 18 C.L.R. 54.
5. 11 C.L.R. 1.
6. 77 C.L.R. 493.
7. 66 C.L.R. 10.

In this case the Court was asked to overrule their prior decision in *Trustees Executors and Agency Co., Ltd.* v. *Federal Commissioner of Taxation.*[1] The learned Judges declined to reconsider it with the following observations:

> "The decisions of a superior Court have a double aspect. They determine the controversy between the parties, and in deciding the case they may include a statement of principle which it is the duty of that Court and of all subordinate Courts to apply in cases to which that principle is relevant. Continuity and coherence in the law demand that, particularly in this Court, which is the highest court of appeal in Australia, the principle of *stare decisis* should be applied, save in very exceptional cases".

The criterion, *viz.*, that of manifest error *plus* injury to public interest by maintenance of previous decision laid down in the above cases as being the ground on which a reconsideration can be granted was reitrated by Justice Williams in his Judgment in *Attorney-General for N. S. W.* v. *Perpetual Trustee Co., Ltd.*[2] In this case the High Court was asked to reconsider the correctness of the majority decision in a prior case, *viz.*, that in *Commonwealth* v. *Quince.*[3] On reconsideration the Judges by a majority affirmed the prior decision. One of the learned Judges, Justice Dixon, considered the matter on its merits elaborately and came to the conclusion that if the matter were to be considered afresh he should prefer a view contrary to that which had been expressed in the prior decision but concurred with the majority view with the following observations:

> "There appears to me to be no ground for reconsidering the decision in *Quince's case*[3] unless it be a sufficient ground simply that the opposite conclusion is to be preferred. It is evident that the decision was reached only after a very full examination of the question. It cannot be said that any compelling consideration or important authority was overlooked or that the decision conflicts with well established principle or fails to go with a definite stream of authority. It is a recent and well considered decision upon what is evidently a highly disputable question.
>
> . . . .
>
> I do not think that we should reconsider the correctness of that decision. The proper course judicially is to follow and apply that decision".

This is a strong case of the year 1951-1952 indicating the most recent practice of that Court, and the above passage aptly summarises almost the very considerations applicable to the present case.

A consideration of these cases shows that while the highest Courts other than the House of Lords have reserved to themselves theoretically the competency to reconsider the correctness of a prior decision, they have also carefully confined the actual exercise of that power within very narrow limits. In a number of cases in which they did permit themselves to reconsider, they have ultimately declined to overrule the prior decision notwithstanding that another view might well have been taken. The only instances brought to our notice where, on a reconsideration, a previous decision was not followed, are two. One is the *Amalgamated Society of Engineers* v. *The Adelaide Steamship Co., Ltd.*[4] That was a case where the question which arose was a very important one as to the power of State Legislature to encroach on the field of the Commonwealth Legislature by virtue of a rule of construction laid down in an earlier case, viz., *Railway Servants' case.*[5] The learned Judges were of the opinion that that was a question of far reaching public importance and *that the prior decision being manifestly wrong and opposed to the rules of construction laid down by the Privy Council in a number of cases,* should be reconsidered and overruled. It would be seen that in this case the Court acted upon the limitations which they have laid down in

1. 69 C.L.R. 270.
2. 85 C.L.R. 2 7.
3. 68 C.L.R. 227.
4. 28 C.L.R. 129.
5. 4 C.L.R. 488.

the course of their decisions, that reconsideration and overruling of a prior decision is to be confined to cases where the prior decision *is manifestly wrong and* its maintenance is productive of great public mischief. The second is the case in *Gideon Nkambule* v. *The King*,[1] where the Privy Council declined to follow its prior decision in *Tumahole's case*.[2] In this case, the Privy Council, while it reaffirmed the proposition that a prior decision upon a given set of facts ought not to be reopened without the greatest hesitation, explained why they, in fact, differed from the previous one in the following passage:

> " From a perusal of the judgment in *Tumahole's case*[2], it is apparent that the history of the adoption and promulgation of the various statutes and proclamations dealing withthe effect of the evidence of accomplices in South Africa was only partially put before the Board, and much material which has now been ascertained was not presented to their Lordships on that occasion. The present case, therefore, is one in which fresh facts have been adduced which were not under consideration when *Tumahole's case*[2] was decided, and accordingly it is one in which, in their Lordship's view, they are justified in reconsidering the foundations on which that case was determined ".

This was a case where the question arose as to the applicability of the English rule of law relating to accomplice evidence as laid down in *Rex* v. *Baskerville*,[3] *viz.*, that a particular portion of the rule which lays down that the evidence of one accomplice cannot be corroborated by that of another. What was under consideration of the Privy Council was whether a prior decision of the Judicial Committee, construing a particular section of the relevant statute applicable in that case in consonance with the above rule, was correct. It will be noticed that the overruling of the prior decision in this case was based on the fact that important and relevant material was not placed before the Judicial Committee in the earlier case. These cases emphasise under what exceptional circumstances a prior decision of the highest and final Court in a country is treated as not binding on itself.

Now what are the grounds in the present case to justify a reconsideration of the prior decision. At this stage, I cannot help noticing that the argument before us—as it appears to me—has taken a somewhat unusual course. I should have thought that when the decision in a case so recent as that in the *United Motors case*,[4] given after full consideration, is sought to be challenged, the first question to have been considered was whether or not there were circumstances to justify a reconsideration. It is only after the Court came at least to a *prima facie* conclusion on that preliminary matter that a reargument on the merits of that decision should have been permitted. What has happened, however, is that the correctness of the prior decision was straightaway canvassed before us and the question as to the competency or the desirability of such reconsideration occupied a latter and subordinate part in the arguments. I must confess to the feeling that this all important question has accordingly suffered for want of due consideration thereof at the stage of arguments before us.

Now, let us see what are the facts relating to the prior decision. The decision was given on the 30th March, 1953. The case itself was heard for 12 working days, *i.e.*, from the 9th February to the 25th February, 1953. The Union of India and as many as eight States were permitted to intervene and their arguments were also heard. A perusal of the judgments then given shows that every possible aspect had been fully presented and considered. The decision was that of a majority as against that of one dissenting Judge. One of the learned Judges in the majority, though concurring on the main point, was pre-

1. L.R. (1950) A.C. 379.
2. L.R. (1949) A.C. 53.
3. L.R. (1916) 2 K.B. 658.
4. (1953) S.C.R. 373 : (1953) 1 M.L.J. 743 : 1953 S.C.R. 1069 (S.C.).

pared to go further on one point than what the majority held (though, as appears now, he is prepared to go back on his concurrence). It is true that in a later decision in *State of Travancore-Cochin* v. *Shanmugha Vilas Cashew Nut Factory*,[1] another Judge of this Court expressed a view in disagreement with the view of the majority in this case. But that was a decision given on the 8th May, 1953, more than a month after the judgment in the prior case had been delivered and had become binding. The question that directly arose for consideration in the later case was not the one that had come in for consideration in the earlier case. However this may be, it may also be noticed that in a later decision of this Court in *Himmatlal Harilal Mehta* v. *The State of Madhya Pradesh*,[2] the law as laid down in the earlier decision in the *United Motors case*,[3] was reiterated and it was stated that the correctness of the view could no longer be questioned, (*see* page 1126). In view of the above facts, it appears to me *prima facie*, that there was no reason for reconsideration except the fact that a different view had been taken by two of the learned Judges of this Court and except the chance of a differently constituted majority emerging on rehearing.

This, however, is sought to be justified on various grounds. It is said that the prior decision does not merely determine the rights of the two contending parties to that case but has far-reaching effects on the rights of the consuming public and that it involves the adjudication of the taxing power of the States as against the consuming public in general. It is, therefore, said that, if that decision is erroneous, it is our duty not to perpetuate the error. It appears to me, with respect, that this is begging the question. There is no absolute standard by which the erroneous character of a previous decision can be ascertained. What a previous decision has determined, must be presumed to be right unless it can be pronounced to be perverse or manifestly wrong. It is, therefore, a strong thing to characterise a previous decision as erroneous where, even on reconsideration, no unanimity is reached and the previous view is supported by a substantial minority. Nor, can the mere fact of one of the prior learned Judges having gone back on his views be any criterion to determine which out of his two views is erroneous. As regards the suggestion of tax burden on the consuming public, it is relevant to notice that the burden, if any, which arises under the prior decision can only be by legislative action of the very State in which the consuming public are residents. The removal of the burden, if called for, is a matter which, under the Constitution, can be brought about by democratic process which is available to the consuming public, through its representatives in the State Legislature. It appears to me that that is not a matter for our consideration. I may be permitted to add that in the course of the arguments there has been no serious grievance made about the alleged burden on the consuming public. But there has been a good deal of emphasis on the harassment to the business community, *i.e.*, to the out-of-State dealers, from whom the tax is primarily collected and passed on, under the law, to the consumer. We are not, however, concerned with any question arising from such alleged hardship. The hardship such as it is, is one that may have to be obviated by the adoption of a common and agreed machinery by all the States for the assessment (as distinguished from levy) and collection of the tax from out-of-State dealers, or if necessary, by the passing of the requisite legislation enabling this to be done. But that hardship, if any, can afford no reason for reversing the prior decision which, as will be shown later, has construed Article 286 consistently with the entire scheme of the Constitution. That decision enables the consuming State to derive an elastic source of revenue from its own resi-

1. 1954 S.C.R. 53 : (1953) S.C.J. 471 : (1954) 1 M.L.J. 690 (S.C).

2. 1954 S.C.R. 1122 : (1954) S.C.J. 445 : (1953) 1 M.L.J. 743 (S.C.).

3. 1953 S.C.R. 1069 : (1953) S.C.J. 373 : (1953) 2 M.L.J. 123 (S.C.).

-dents to make it available for the expanding needs of the State in the discharge of the responsibilities allotted to it under the Constitution. It is not for this Court now to choose between, the alleged hardship of the business community and the interests of the consuming State and treat the former as a ground for reconsideration.

It is next suggested that there is some vagueness, if not inconsistency, in the prior majority judgment which justifies reconsideration. It is said, with reference to a particular passage quoted from the judgment, that it is only buyers falling within the Explanation who were contemplated as liable and not the out-of-State dealers, but that the whole trend of the rest of the judgment and the actual decision runs counter to this. With very great respect, it is hardly fair to read the decision as being in any way vague or inconsistent with itself by extracting one single passage. The passage relied on is at page 1084 and appears, in the context where the question was being considered, as to whether the phrase "actual delivery for consumption" has reference to "delivery to the actual consumer-purchaser" or delivery also to "a purchaser for eventual distribution to the consumers in the State". The view indicated in the extracted passage was that delivery to a *purchaser* for eventual distribution to the consumer in the State was also "actual delivery for consumption" and hence the designation of purchaser as liable to tax in that passage. That the extracted passage was not meant to indicate that only such purchaser was taxable and not the seller is quite clear from the various passages in the immediately succeeding paragraph at pages 1084 and 1085 where "taxation of sales or purchases involving inter-State elements by the State in which the goods are delivered for consumption in the sense explained above" is repeatedly referred to. All that can, if at all, be said is that the decision has not, in terms, indicated the choice between the seller or the purchaser as regards taxability but has indicated either of them as taxable.

It has next been said that the impugned decision is a recent one and that "judicial opinion was divided, if not evenly balanced". It is no doubt true that the prior decision is only two years old. But that is not by itself a ground for reconsideration. On the other hand, I should have thought that the very fact of its being recent should militate against reconsideration. The real test, to my mind, as indicated by Justice Dixon in *Attorney-General for N. S. W.* v. *Perpetual Trustee Company, Limited*,[1] is whether it was a fully considered judgment and whether any fresh material has been brought to the notice of the Court. In considering the question whether a decision is open to reconsideration on account of its being recent, it is of importance to observe that our decisions become declarations of law under Article 141 and must be treated normally as final from the very moment they are pronounced. The finality of the decisions of this Court, which is the Court of last resort, will be greatly weakened and much mischief done if we treat our own judgments, even though recent, as open to reconsideration.

It has next been suggested that rectification of the error, if any, in the view taken by the previous decision, is difficult and that this could be brought about only by the amendment of the legislative lists necessitating the consent of the requisite number of States. With respect, I am unable to appreciate this. The points of difference in the two opposing views ultimately boil down to this. (1) Does the Explanation to Article 286 (1) (*a*) taken with the relevant legislative entry enable the consuming State to tax fictional inside sales? (2) If so, does Article 286 (2) override this taxing power? If the right construction of Arti-

1. 85 C.L.R. 237.

cle 286 (2) is *not* what has been accepted by the majority in the prior decision, what all was required to correct that error would be to amend Article 286 (2) so as to make it clear that it overrides Article 286 (1) (*a*) taken with the Explanation by the insertion therein of some appropriate phrase like "notwithstanding Explanation to Article 286 (1) (*a*)". The responsibility for any such amendment, if called for, should be left to the Parliament who, as recent experience has shown, is quite capable of bringing about constitutional amendments when it felt the clear necessity for it.

The proper course for this Court, therefore, is to adopt the attitude of Justice Dixon in the case in *Attorney-General for N. S. W.* v. *The Perpetual Trustee Co. Ltd.*,[1] wherein notwithstanding that he came to a contrary conclusion, he declined to disturb the prior decision. The case for not disturbing the prior decision is all the stronger, where, as happens in the present case, no unanimous opinion could be reached in favour of overruling the prior decision.

Notwithstanding my opinion that there is no ground for reconsideration of the prior decision of this Court in the *United Motors case*,[2] I propose, out of respect for my learned brothers, who are prepared to take the opposite view, to give my reasons why, on a fresh consideration of the question involved, I am clearly in agreement with the decision of the majority in the said case. Having had the benefit of reading the judgments of my learned brothers, Justice S. R. Das and Justice Venkatarama Aiyar, I propose to confine myself mainly to the consideration of the construction of Article 286.

There can be no doubt that Article 286 taken as a whole has to be read in the context of the power vested in the States for levying taxes on the sales or purchases of goods (other than newspapers) under Entry 54 of List II of the Seventh Schedule taken with Article 246 (3). Entry 54 does not, in terms, say that the sales or purchases of goods contemplated thereby as taxable are to be sales or purchases "within the State". In this respect it is in contrast with Entry 26 which vests in the State the power to legislate in respect of trade and commerce "within the State". The apparently wide language of Entry 54 is in recognition of the theory that in substance a tax on sale or purchase of goods is a tax on the goods with reference to the event of sale or purchase thereof. (See the *United Motors case*).[2] Article 286 appears in Part XII of the Constitution relating to finance, property, contracts and suits and is in Chapter I thereof relating to finance. This is mainly concerned with the problem of allocation of finances between the Centre and the States in order to enable each to carry on the respective governmental functions allotted to it under the Constitution. Keeping this context in view as also the avowed purpose of the Article as indicated by the marginal note, it may be taken that Article 286 was intended to indicate clearly the ambit of the taxing power of the State on sales or purchases of goods and to limit it to a demarcated field. To determine the exact scope of this ambit and of the limitations, it is relevant to consider what was the sales-tax law in operation just *prior*, to the new Constitution.

A careful and thorough examination of the Provincial Sales-tax Acts at the time discloses the following. There were sales-tax laws in operation in all the then nine Provinces, which subsequently became Part A States under the Constitution, as also in one Native State of Mysore. The pattern of the sales-tax laws in every one of the ten units had the following common features (with minor additions and variations). Under the charging section in each of these Acts, tax was levied as against a "dealer" whose turnover of sales (or purchases) exceeded a particular amount. A "dealer" was defined as a person carrying on

1. 85 C.L.R. 237.
2. 1953 S.C.R. 1069: 1953 S.C.J. 373: (1953) 1 M.L.J. 743 (S.C.).

the business of selling or supplying goods *in the Province*. "Sale" was defined as meaning transfer of property in goods in the course of trade for valuable consideration. In addition, each one of these Sales-tax Acts had an Explanation to the definition of the word "sale" to the effect that, notwithstanding anything to the contrary in the Indian Sale of Goods Act, a sale or purchase of goods "*which were actually in the Province*" at the time when the contract of sale or purchase is made, *shall be deemed* to have taken place in the Province, wherever the contract for sale or purchase may have been made. This was, broadly speaking, the common pattern of every one of the sales-tax laws just prior to the Constitution, subject to some further additions to the definition of sale by a few of the States, which will be presently noticed. This pattern indicates, that apart from the purely internal sales—in respect of which the power of taxation by the States was undoubted—the States claimed the power to tax *sales with an outside element* in the following two cases: (1) Where the transfer of ownership in the goods was within the State (assumed to be so) according to the Indian Sale of Goods Act. (2) Where the goods which are the subject-matter of the sale are actually in the Province at the time when the contract of sale is made, *i.e.*, at the crucial moment of transfer of ownership. If I may express this in another way, these Sales-tax Acts purported to tax sales as being within the State, with reference to (1) *situs* (as assumed) under the Sale of Goods Act, and (2) *situs* (as probably assumed to be) under the general law. It is possible that this general law was so assumed with reference to the dictum of Lord Loreburn in *Badische Anilin Und Soda Fabrik* v. *Hickson*[1], which suggests that the *situs* of the goods at the time of appropriation of the goods to a particular sale is the *situs* of the sale. Whether the underlying assumptions as regards both these criteria were right or wrong is not material at this stage. While this was the general pattern, four of the States claimed the taxing power with reference to some additional criteria. Madras and Mysore had an additional Explanation as follows:

"In case the contract was for the sale or purchase of future goods by description, then, if the goods are actually produced in the Province at any time, after the contract of sale or purchase in respect thereof was made, the sale or purchase shall be deemed to have taken place in the Province, wherever the contract of sale or purchase might have been made, notwithstanding anything to the contrary in the Indian Sale of Goods Act".

Bihar and United Provinces had the following additional Explanation. (Taken from the U. P. Act).

"Notwithstanding anything in the Indian Sale of Goods Act, the sale of any goods which are produced or manufactured in the Province *by the producer or manufacturer thereof*, shall, wherever the delivery or contract of sale is made, be deemed for the purposes of the Act to have taken place in the Province".

Both these additions refer to future goods. Madras and Mysore apparently treated such future goods as having been appropriated to the sale the moment they were "actually produced in the Province". The Bihar and U. P. addition was more or less the same and is limited to the case of sale *by the very manufacturer or producer*. The above additions are in effect the same as category No. 2 of the general pattern as applied to future goods. The underlying assumption appears to be that future goods which are contracted to be sold get appropriated thereto on their coming into existence and that thus a taxable sale emerges. Besides the above mentioned variations from the general pattern, Bihar and Uttar Pradesh had further additions to the definition of sale relating to forward contracts which virtually amounted to treating "agreement to sell" itself as being the taxable event. This, it may be seen, had nothing to do with the nexus theory of taxation of sales and has been pronounced invalid by this Court in *The Sales Tax Officer, Pilibhit* v. *Messrs. Budh Prakash Jai Prakash.*[2]

1. L.R. (1906) A.C. 419.
2. (1955) 1 S.C.R. 243 : (1954) S.C.J. 573 : (1954) 2 M.L.J. 124 (S.C.).

From the above broad summary it will be seen that the Provinces were deriving sales-tax revenues not only in respect of purely internal sales, but also in respect of sales with an outside element. But in the generality of such sales, the tax was leviable at either or both of the above mentioned two points, *i.e.*, (1) transfer of ownership within the State, (2) actual existence of goods within the State at the moment of such transfer. The ultimate consumer in respect of such sales would normally be not a person within the taxing State. Hence having regard to the structure of the sales-tax and the universally accepted machinery therefor which brings about the passing on, of the incidence thereof, to the ultimate consumer, this must have been felt to be inequitable. It appears to me that in the adjustments called for on the passing of the Constitution it was this feature of the pre-existing sales-tax law which called for being remedied by the imposition of a ban on taxation of sales with an outside element. But that very consideration would equally indicate the permissibility of taxing an outside sale where the ultimate burden of it could be passed on to the resident of the very taxing State. This could be done by making the consuming State the taxing State. This, in my opinion, was the background with reference to which Article 286 was incorporated in the Constitution.

The Constitution wanted to put a ban on taxation of sales with an outside element on account of the inequity of making the residents of other States contribute towards the resources of the selling State. But in doing so it could not have intended to confine the resources of the State under this head to the comparatively small field of purely internal sales. Having regard to the expanding needs of a social-welfare State and the limited taxing powers allocated to it, the Constitution could not have meant to limit an elastic source of taxation payable by its own consumers to the very small field of purely internal sales. It, therefore, selected and took out one category of sale with an outside element from the field of restriction, by adopting the device of a fictional inside sale and left that category taxable so that the incidence thereof may be the same as that of a purely internal sale. This, to my mind, is the reason for the positive approach in the Explanation by a deeming provision as to an inside sale. It is on account of this common feature, as to the incidence of taxation, that the fictional inside sale indicated in the Explanation was assimilated to a purely internal or intra-State sale. It appears to me not very reasonable to assume that the Explanation to Article 286 (1) (*a*) was required in order merely to determine what an outside sale is. If the Constitution intended nothing more than to ban taxation on outside sales, it might well have contented itself with declaring such a ban. I do not think that the Courts would then have found any serious difficulty in construing "outside sale" to mean, a sale with a substantial outside element, or in the alternative, as a sale in which the ownership has passed outside the State in the assumed sense of the Sale of Goods Act. It was quite unnecessary and indeed out of the way to define an outside sale as the implied negative of a fictional inside sale. Nor can the purpose of the Explanation be readily assumed to be to obviate the supposed chaotic condition arising out of the adoption of the nexus theory in the Sales-tax Acts. This could have been sufficiently and effectively provided for—as in fact it was done—by the ban imposed under Article 286 (2). It has been suggested that the Explanation covers some outside sales which do not fall within Article 286 (2) and that therefore the Explanation was necessary. But the possibility of a few ingenuously illustrated cases—like the Gurgaon-Delhi illustration put forward in the course of arguments—as falling outside the ambit of Article 286 (2) and within the scope of Article 286 (1) (*a*) taken with the Explanation, would not have been any adequate reason for the Constitution involving itself in two such provisions, mostly overlapping in effect. It appears to me, therefore, that the reasons for having these two provisions were distinct and

different. Article 286 (1) (*a*) with the Explanation was meant to prevent taxation whose ultimate incidence would fall on residents of outside States. Article 286 (2) was meant to prevent the taxing structure of the States being availed so as unduly to hamper the freedom of inter-State trade and commerce which, for the first time, the Constitution declared by Article 301. In this context it also became necessary to provide that the foreign trade of the country should not be affected at all by the sales-tax structure of the States, while at the same time indicating that the internal trade could be permitted to bear a limited burden of taxation. It is in reconciliation of these various ideas that Article 286 (1) and (2) were drafted.

Judged in this light the following is the only reasonable construction of Article 286 (1) (*a*) taken with the Explanation. This provision while intended to prohibit taxation by States on outside sales was also meant to demarcate the boundary between inside sales and outside sales and to assimilate one particular category of outside sales into the field of inside sales and to make it available for taxation by the consuming State. The underlying aim of this demarcation was to obviate the inequity of one State levying a tax whose ultimate incidence was on the residents of another State but to provide instead an elastic source of taxation which in its effect was to be against its own residents. The field of export trade is completely marked off as not being available for the operation of sales-tax by Article 286 (1) (*b*). Then the ban on sales in the course of inter-State trade and commerce is declared. This ban, which was for a totally different purpose cannot be so construed as to nullify the positive results intended and brought about by Article 286 (1) (*a*) read with the Explanation. To such a situation the principle of harmonious construction would apply as enunciated by Lord Herschell in *John Carter Colquhoun* v. *Henry Brooks*[1] at page 506 in the following terms:

> "It is beyond dispute that we are entitled and indeed bound when construing the terms of any provision founded in a statute to consider any other parts of the Act which throw light upon the intention of the Legislature and which may serve to shew that the particular provision ought not to be construed as it would be if considered alone and apart from the rest of the Act."

If, as my learned brother Justice Venkatarama Aiyar, is inclined to think, a sale cannot be said to have occurred in the course of inter-State trade and commerce if the sale *follows* the completion of the inter-State transportation of goods, as for instance, would be the case when hawking pedlar brings goods across a State boundary and vends it from door to door in another State, then clearly the fiction which brings about the notional inside sale would by itself be sufficient to take such a sale out of the category "of the course of inter-State trade and commerce". Because, in such a situation, while the transportation of goods across State boundaries remains as a fact, the sale itself is deemed to be inside the consuming State, the very purpose of the fiction being to shift the *situs* of the sale for the purpose of taxability. It is, I think, in this sense that in the earlier decision, the learned then Chief Justice laid down that by virtue of the Explanation this particular category of inter-State sale became in intra-State sale, of course, not for all purposes, but for the limited purposes for which the Explanation was inserted, *viz.*, the purpose of demarcating the taxable field from the non-taxable field. Looked at either on the ground of harmonious construction or on the ground that the notional inside sale brought about by the Explanation ceased, by that very fiction, to be part of the course of inter-State trade and commerce *for taxation purposes*, the only proper construction of Article 286 (2) would be that it cannot override Article 286 (1) (*a*) taken with the Explanation. Having indicated the broad lines on which I have, on independent

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1. L.R. (1889) 14 A.C. 493 at 506.

consideration of the construction of Articles 286 (1) and (2), arrived at the same construction as that adopted in the *United Motors case*,[1] it is unnecessary for me to deal with all the various aspects raised before us in the course of the arguments, except to express my general agreement with a good deal of the reasoning of my learned brother, Justice Venkatarama Aiyar, on this part of the case. It is, however, necessary to refer to a few matters referred to in the contrary view.

The contrary opinion adopted by my learned brothers is based almost entirely on the view that Article 286 is inspired by the anxiety of the Constitution to prevent the mischief of multiple taxation, which arose from the operation of the pre-existing sales-tax laws. It is said that this result was achieved by covering all loopholes from various angles, Articles 286 (1) (*a*), 286 (1) (*b*), 286 (2) and 286 (3) being said to be the four plugging points. With respect, I can only think that this is the outcome of an overdrawn picture as to the chaos said to have been created by the earlier pre-Constitution sales-tax laws. As already pointed out, the common feature of all previous ten Sales-tax Acts, was to bring about limited multiple-taxation in respect of outside sales at two points, *viz*. (1) transfer of ownership within the taxing State, and (2) the actual presence of goods in the taxing State at the point of time when the transfer of ownership takes place in another State. It must be mentioned that *none* of the Sales-tax Acts took the *mere* presence of goods in the State as enabling it to levy the tax. What was taken as enabling taxation was the existence of goods within the State at the crucial point of time, *viz.*, the point at which the ownership became transferred wherever it may be. Once this is appreciated, it is difficult to agree with the assumption that under the pre-existing law, the taxation might get multiplied in the course of the transit of goods under sale through a number of States, if the goods happened *to remain* in the successive States for some time. In none except one of the States would the goods be in actual existence at the single crucial point of time of transfer of ownership. Hence, I am clear in my mind that the previous legislation would not have normally involved taxation of the same sale with an outside element, at more than two points. (Whether even this would not get limited by the fact that a "dealer" is defined in all the then Acts as "within the Province" would be a matter for consideration). Four of the then provincial units had, as already stated, an additional criterion for taxation. But, so far as Madras and Mysore were concerned that criterion which relates to future goods cannot be cumulative with criterion two. So far as U.P. and Bihar are concerned which authorised the manufacturing State as such to levy the tax, it appears to me that if it is borne in mind that this is limited to the sale *by the very manufacturer*, this was also not likely to operate as a cumulative point. Even otherwise these additional criteria might, if at all, have given rise to taxation at a third point, when the sale transaction had to be put through *via* these particular States. But even so there is no justification for the impression of chaotic conditions resulting therefrom which has been assumed. There is no evidence before us that prior to the Constitution there was *in fact* multiple taxation of sales in operation, at any rate at more than the two points as explained by me above. Hence in the light of the detailed scrutiny of the provisions in the various Sales-tax Acts which were in force prior to the Constitution, I cannot help feeling that the mischief of multiple taxation which might if at all have existed in a limited measure as pointed out above, has been overstated. No doubt, the future prevention of such multiple taxation by invoking the nexus theory recognised by the Privy Council in *Wallace's case*[2] may well

1. 1953 S.C.R. 1069 : 1953 S.C.J. 373 : (1953) 1 M.L.J. 743 (S.C.).

2. (1948) F.C.R. 1 : L.R. 75 I.A. 86 : (1948) 2 M.L.J. 62 (P.C.).

be one of the *results* of Article 286. But I am unable to think that the main purpose underlying each and every one of the provisions of Article 286 was to prevent the continuance of pre-existing chaotic conditions of multiple taxation by virtue of the nexus theory. I cannot help feeling that a wholly wrong impression of the pre-existing state of law in this respect has been created by overlooking that the existence of goods in a particular State has been taken as a taxing point *only if* that existence was at the crucial moment of transfer of ownership. (A statement showing the definition of "sale" under each of the Sale-tax Acts in operation just prior to the Constitution is appended—as Appendix I—for reference.)

On the construction of Article 286, reference has also been made in the dissenting view to sub-Aritcle 3 of Article 286 which runs as follows:

> "No law made by the Legislature of a State imposing, or authorising the imposition of, a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent".

With great respect, I am unable to see its bearing on the question at issue. It is a totally different kind of restriction from what sub-Articles (1) and (2) bring about. While sub-Articles (1) and (2) impose certain bans on taxation what sub-Article (3) does is *not* to impose a ban at all but to impose a fetter in respect of taxation on sales of essential goods declared as such by the Parliament by requiring that before such a taxation-law can have any affect, it should be reserved for the consideration of the President and receive his assent. In this respect it is in line with what would happen if any other State legislation passed by that Legislature is presented to the Governor for his assent *and* he reserves the same for the consideration of the President. The only difference is that while in the latter the reservation for the President is optional in the case of such essential goods the reservation is compulsory. Subject to this, even essential goods continue to be, in theory and by Constitution, taxable (by the States themselves) in respect of sales thereof. I am, therefore, unable to see the bearing of this provision on the construction of the other two provisions which bring about a total or contingent ban of taxation in respect of the sales to which they have reference.

There is one other matter which has been stressed or implied in the dissenting view and it is this. The assumption is that even a single point tax on a sale arising in the course of inter-State trade would be a burden on the freedom of inter-State trade and commerce guaranteed under the Constitution by Article 301 which runs as follows:

> "Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free".

Now it is not disputed that a tax on a purely internal sale which occurs as a result of the transportation of goods from a manufacturing centre within the State to a purchasing market within the same State is clearly permissible and not hit by anything in the Constitution. If a sale in that kind of trade can bear the tax and is not a burden on the freedom of trade, it is difficult to see why a single point tax on the same kind of sale where a State boundary intervenes between the manufacturing centre and the consuming centre need be treated as a burden, especially where that tax is ulimately to come out of the residents of the very State by which such sale is taxable. Freedom of trade and commerce applies as much within a State as outside it. It appears to me again, with great respect, that there is no warrant for treating such a tax as in any

way contrary either to the letter or the spirit of the freedom of trade, commerce and intercourse provided under Article 301.

For all the above reasons, I am quite clear in my mind that the view taken in the prior decision, *viz.*, that the consuming State has the present power to tax a fictional inside sale which falls within the scope of the Explanation and that the said power is not affected by Article 286 (2) and that Article 286 (2) cannot be construed as overriding Article 286 (1) (*a*) read with the Explanation, is correct and that there is no reason to depart from that decision.

The real difficulty, if any, that arises from this view is as regards what has been called the extra-territorial operation of the tax which such a view may involve. In the conclusion reached by my learned brothers who are prepared to uphold the dissenting view taken in the prior decision that question does not arise for consideration and has been left untouched. I do not, therefore, feel called upon to go into it or to commit myself to any particular view on this somewhat difficult question. I am doubtful whether, as between the component States of a Union of the kind, which India is under the Constitution, there can be any question of extra-territoriality in the sense of the doctrine that one nation does not act in aid of the revenue laws of another (and foreign) nation. It is true that a defined geographical part of India constitutes the territory of each unit called the State and that the governance of that unit is committed to that State. But it appears to me that on that account the territory of one State is not a foreign territory in respect of another State, when freedom of movement and a number of other common fundamental rights are guaranteed. On the other hand, I think it permissible to suggest that where the various States owe their existence to the same Constitution and are subject to its common operation, any taxing power vested in an individual State must carry with it the incidental implication of enforceability, if need be, in any other State within the Union when the very nature of that tax, as contemplated by the Constitution involves it. In this context Article 261 (1) which enjoins that full faith and credit shall be given throughout the territory of India to public acts, records and judicial proceedings of the Union and of every State, may well be relied upon to justify such a view. I am aware that this has been generally taken as applicable to judicial and legislative proceedings. But the language of the Article is capable of wider application. I do not, however, wish to go into the matter further because even if in the course of the administration of sales-tax, of the kind permissible, in the view of Article 286 which the prior decision has accepted, there emerges the element of extra-territorial operation of such a tax, that by itself can be no reason for negativing the construction of Articles 286 (1) and (2) above indicated. In this context it is necessary to bear in mind the following clear dictum of the Privy Council in *British Columbia Electric Railway Co., Ltd.* v. *The King*[1].

> " A legislature which passes a law having extra-territorial operation may find that what it has enacted cannot be directly enforced, but the Act is not invalid on that account, and the Courts of its country must enforce the law with the machinery available to them ".

The question, therefore, of extra-territoriality is not germane for construction of Article 286.

At the present stage we are not concerned with the enforcement of the levy of the assessed tax but with the assessment of the tax. All that we are concerned with is the validity of the steps so far taken by the assessment authorities and particularly of the notice dated the 29th May, 1952, which intimates that on non-compliance before the 14th June, 1952, proceedings for assessment on the basis of "best judgment" will be made. That step, to my mind, is

1. L.R. (1946) A.C. 527 at 542.

perfectly valid as appears from the following. In *Whitney* v. *Commissioners of Inland Revenue*[1] the House of Lords by a majority held that where a tax was leviable on a non-resident, a requisition served upon him by post to file a return and to produce accounts was valid so as to entitle the taxing authority to make an assessment on the basis of best judgment on non-compliance with the requisition. The following passage from Lord Wrenbury's speech at page 56 is instructive:

> "There is a second question in the case—namely, whether the appellant has been duly brought within the machinery for assessment provided by the Act. This turns upon section 7. There was sent to the appellant by post addressed to him in the United States a notice under section 7, sub-section 2, requiring him to make a return. It is contended that there was no right to post him such a notice so addressed. The case, it is contended, is similar to the case of service of a writ out of the jurisdiction. I do not agree. It is similar rather to the service of a notice of dishonour of a bill or of a notice to quit or of a notice requiring payment of calls upon shares as a preliminary to forfeiture in default of payment. It is not a step in judicial proceeding but a step which will create *inter partes* a state of things in which judicial proceedings can subsequently be taken in default of compliance".

It may be that some or all of the provisions in the Bihar Act which contemplate enforcement out of State or create penalties for non-compliance out of State may require closer examination when the validity thereof is directly challenged. It may also be that the harassment consequent on such outside operation may require to be remedied either by agreed co-ordination between the States or by appropriate legislation, if need be. These, however, are not relevant considerations for us on the question we have now to deal with.

I am accordingly clear in my opinion that this appeal should be dismissed with costs.

APPENDIX—I.

Statement showing the definition of "sale" under each of the Sales-Tax Acts in operation just prior to the commencement of the Constitution.

(*Vide* page 746.)

MADRAS SALES-TAX ACT, 1939.

"Sale" (with all its grammatical variations and cognate expressions) means every transfer of the property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration, (and includes also a transfer of property in goods involved in the execution of a works contract, but does not include a mortgage, hypothecation, charge or pledge;)

(*Explanation* 1: A transfer of goods on the hire-purchase or other instalment system of payment shall, notwithstanding the fact that the seller retains the title in the goods as security for payment of the price, be deemed to be a sale.)

Explanation 2: Notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale or purchase of any goods shall be deemed, for the purposes of this Act, to have taken place in this Province, wherever the contract of sale or purchase might have been made—

(*a*) if the goods were actually in this Province at the time when the contract of sale or purchase in respect thereof was made, or

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1. L.R. (1926) A.C. 37.

(b) in case the contract was for the sale or purchase of future goods by description, then, if the goods are actually produced in this Province at any time after the contract of sale or purchase in respect thereof was made.

BENGAL FINANCE (SALES-TAX) ACT, 1941.

'Sale'' means any transfer of property in goods for cash or deferred payment or other valuable consideration..........

* * * *

Explanation 2: Notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale of any goods which are actually in West Bengal at the time when the contract of sale (as defined in that Act) in respect thereof is made, shall, wherever the said contract of sale is made, be deemed for the purposes of this Act to have taken place in West Bengal.

BOMBAY SALES-TAX ACT, 1946.

"Sale" means any transfer of property in goods for cash or deferred payment or other valuable consideration...............

* * * * *

Explanation 2: Notwithstanding anything to the contrary in the Indian Sale of Goods, 1930, the sale of any goods which are actually in the Province of Bombay at the time when the contract for sale (as defined in that Act) is made in respect thereof, shall, wherever the said contract of sale is made, be deemed for the purposes of this Act to have taken place in the Province of Bombay.

ASSAM SALES-TAX ACT, 1947.

"Sale" means any transfer of property in goods by any person for cash or deferred payment or other valuable consideration.........

* * * * *

Explanation : Notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale of any goods which are actually in the Province at the time when the contract of sale (as defined in that Act) in respect thereof is made, shall, irrespective of the place where the said contract is made, be deemed for the purposes of this Act to have taken place in the Province.

BIHAR SALES-TAX ACT, 1947.

"Sale" means......... any transfer of property in goods for cash or deferred payment or other valuable consideration.........

* * * * *

Provided further that notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale of any goods—

(i) which are actually in Bihar at the time when, in respect thereof, the contract of sale as defined in section 4 of that Act is made, or

(ii) which are produced or manufactured in Bihar by the producer or manufacturer thereof,

shall, wherever the delivery of contract of sale is made, be deemed for the purposes of this Act to have taken place in Bihar;

Provided further that the sale of goods in respect of a forward contract, whether goods under such contract are actually delivered or not, shall be deemed to have taken place on the date originally agreed upon for delivery.

CENTRAL PROVINCES AND BERAR SALES-TAX ACT, 1947.

"Sale" ....means any transfer of property in goods for cash or deferred payment or other valuable consideration.......... .

* * * * *

Explanation 2: Notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale of any goods which are actually in the Central Provinces and Berar at the time when the contract of sale as defined in that Act in respect thereof is made, shall wherever the said contract of sale is made, be deemed for the purpose of this Act to have taken place in the Central Provinces and Berar.

ORISSA SALES-TAX ACT, 1947.

"Sale" means............any transfer of property in goods for cash or deferred payment or other valuable consideration........ .

* * * * *

Provided further that notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale of any goods which are actually in Orissa at the time when, in respect thereof, the contract of sale as defined in section 4 of that Act is made, shall, wherever the said contract of sale is made, be deemed for the purpose of this Act to have taken place in Orissa.

MYSORE SALES-TAX ACT, 1948.

"Sale" means......every transfer of the propperty in goods by one person to another in the course of trade or business for cash or deferred payment or other valuable consideration.......... .

* * * * *

Explanation 2: Notwithstanding anything to the contrary in the Sale of Goods Act, 1932, the sale or purchase of any goods shall be deemed, for the purposes of this Act, to have taken place in Mysore, wherever the contract of sale might have been made;

(*a*) if the goods were actually in Mysore at the time when the contract of sale or purchase in respect thereof was made, or

(*b*) in case the contract was for the sale or purchase of future goods by description, then, if the goods are actually produced in Mysore at any time after the contract of sale or purchase in respect thereof was made.

EAST PUNJAB GENERAL SALES-TAX ACT, 1948.

"Sale" means any transfer of property in goods for cash or deferred payment or other valuable consideration............ .

* * * * *

Explanation 2: Notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale of any goods which are actually in East Punjab at the time when the contract of sale (as defined in that Act) in respect thereof is made, shall, wherever the said contract of sale is made, be deemed for the purposes of this Act to have taken place in East Punjab.

UNITED PROVINCES SALES-TAX ACT, 1948.

"Sale" means .... any transfer of property in goods for cash or deferred payment or other valuable consideration................ .

* * * * *

Explanation II.—Notwithstanding anything in the Indian Sale of Goods Act, 1930, or any other law for the time being in force, the sale of any goods—

(*i*) which are actually in the United Provinces at the time when in respect thereof, the contract of sale as defined in section 4 of that Act is made, or

(*ii*) which are produced or manufactured in the United Provinces by the producer or manufacturer thereof, shall, wherever the delivery or contract of sale is made, be deemed for the purposes of this Act to have taken place in the United Provinces.

Explanation III.—Where goods under a forward contract are not actually delivered, the sale in respect of such contract shall be deemed to have been completed on the date originally agreed upon for delivery.

Note.—The omitted portions in the definitions other than those in the Madras Act are to the same effect as those shown within brackets in the Madras definition.

Venkatarama Ayyar, J.—The appellant is a Company registered under the Indian Companies Act carrying on business in the manufacture and sale of sera, biological products and medicines. Its registered office is at No. 153, Dharamtalla Street, Calcutta, and its laboratory and factory are situated at Baranagar, 24 Parganas, West Bengal. The first respondent is the State of Bihar, and respondents 2 and 3 are respectively the Secretary and the Assistant Secretary of Commercial Taxes. On the 18th December, 1951, the second respondent issued a notice under section 13 (5) of the Bihar Sales Tax Act, 1947 (Act XIX of 1947), (hereinafter referred to as the Act) calling upon the appellant to register itself as a dealer under the Act and to submit a return for assessment of sales tax. To this the appellant sent a reply on the 8th Januay, 1952, disputing its liability on various grounds, and after further correspondence between the parties which it is needless to set out, the third respondent sent a notice on the 29th May, 1952, that if the appellant failed to comply with the notice dated the 18th December, 1951, by the 14th June, 1952, steps would be taken to assess tax on the basis of best judgment. The appellant replied by filing the application out of which the present appeal arises under Article 226 of the Constitution for a writ of prohibition restraining the respondents from proceeding with the assessment. It was alleged in the petition that as the appellant had no place of business within the State of Bihar, the provisions of the Act under which it was sought to be taxed were *ultra vires* as extra-territorial in operation, and that further those provisions were repugnant to Article 286 (2) of the Constitution and were therefore void. The State of Bihar, which will hereafter be referred to as the respondent, resisted the application on the ground firstly, that it was not maintainable for the reason that the appellant had, under the provisions of the Act, a right of appeal against the assessment to the appropriate authorities, and secondly, that as the sales proposed to be taxed must be deemed to have taken place by reason of the Explanation to Article 286 (1) (*a*) within Bihar, the provisions of the Act imposing tax on a non-resident seller were neither *ultra vires* nor unconstitutional. The learned Judges of the High Court upheld both these contentions and dismissed the application, and this appeal has been preferred against their judgment on a certificate granted under Article 132 (1) of the Constitution. In view of the importance of the issues involved, leave of the Court was sought by and granted to ten States, one commercial firm and one

individual dealer. Nine out the ten States, namely Orissa, Pepsu, Punjab, Madhya Pradesh, Madras, Mysore, Rajasthan, Travancore-Cochin and Uttar Pradesh, have intervened and supported the respondents. One State, West Bengal, represented by the learned Attorney-General supported the appellant, and so did the Tata Iron and Steel Co., Ltd., and one M. K. Kuriakose.

On the arguments addressed before us, the following points arise for determination:

1. Whether the application for a writ of prohibition is maintainable?

2. Whether the Explanation to Article 286 (1) (*a*) confers authority on the State Legislatures to impose tax on sales falling within its purview?

3. Whethe the sales covered by the Explanation to Article 286 (1) (*a*) are subject to the prohibition contained in Article 286 (2)?

4. Whether the Bihar Sales Tax Act, 1947, is invalid on the ground that it is extra-territorial in its operation, and *ultra vires* the power of the State Legislature?

5. Whether the assessment proposed to be made on the appellant is not authorised by the Explanation to Article 286 (1) (*a*)?

1. On the question of the maintainability of the application for a writ of prohibition, it was observed by the learned Judges that under section 13 (5) of the impugned Act, the Commissioner was competent to decide whether the appellant was a person liable to pay tax under the Act, that even if he came to an erroneous conclusion on the merits, that did not affect his jurisdiction over the subject-matter, that the Act itself provided in sections 24 and 25 a complete and effective machinery by way of appeal and revision for correction of such errors, and that accordingly a writ of prohibition was not the proper remedy. If the learned Judges intended to lay down that a writ of prohibition should not issue because another remedy was open under the Act, that cannot be supported. The existence of another remedy is a very material circumstance to be taken into account when the Court is called upon to issue a writ of *certiorari*, but wholly different considerations arise when the writ asked for is prohibition. Writ of prohibition is issued whenever a subordinate Court or Tribunal usurps jurisdiction which does not belong to it, and when that has been shown, the issue of the writ, though not of course, is of right and not discretionary. The point to be determined, therefore, is whether in taking proceedings under section 13 (5) of the Act, respondents 2 and 3 acted without jurisdiction or in excess of it. The contention of the appellant is that the Bihar Legislature had no competence to tax the sales in question, because they were effected in Bengal, and the appellant was not carrying on business within the State of Bihar. If this contention is well-founded, then section 13 (5) of the Act would be void and inoperative in its application as against the appellant, and the proceedings taken thereunder would in consequence be without jurisdiction. We are not here concerned with a statute whose *vires* is not in question, and which confers jurisdiction on any authority to take proceedings if certain facts exist and the enquiry directed by the authority is as to whether those facts exist. The determination in such a case is incidental to the effective exercise by the authority of its undisputed jurisdiction and if, as a result of that enquiry, it came to an erroneous conclusion, there is no error of jurisdiction, and it might well be contended in that case that the remedy of the party aggrieved was to resort to the machinery provided in the statute itself by way of appeal or revision, and that a writ of prohibition would be misconceived. But here, the contention of the appellant is that the statute itself is void in so far as it authorises the imposition of a tax on dealers who are not residents within the State or do not carry on business there, and that, in consequence, the proceedings taken under section 13 (5) of the Act

should be restrained on the ground of want of jurisdiction. It is no answer to this contention that the appellant should seek redress through the channels provided in the Act therefor. Indeed, the contention that the Act is *ultra vires* is not one which the Tribunals constituted under the Act, whether original, appellate, or revisional, could entertain, their duty being merely to administer the Act.

It was argued by Mr. N. C. Chatterjee that if the tax was illegal, as contended by the appellant, then the proceedings taken for imposing the same would amount to unconstitutional interference with the fundamental right of the appellant to carry on business guaranteed under Article 19 (1) (*g*), and that the Courts were bound to interfere under Article 226. He relied on the decisions of this Court in *Mahomed Yasin* v. *The Town Area Committee, Jalalabad,*[1] *The State of Bombay* v. *The United Motors (India), Limited,*[2] and *Himmatlal Harilal Mehta* v. *The State of Madhya Pradesh.*[3] That is undoubtedly the position in law, but as the appellant is a Company registered under the Indian Companies Act and the question whether a juristic person is a citizen for the purpose of Article 19 (1) (*g*) is still an open one, I would prefer not to rest my decision on this ground. It is sufficient for the purpose of this appeal to hold that a writ of prohibition should issue, if the appellant establishes that the proceedings taken against it under section 13 (5) of the Act are without jurisdiction. The contentions urged in support of that position must now be examined.

2. It is firstly argued that the Explanation to Article 286 (1) (*a*) on which the validity of the impugned Act depends confers no authority on the State Legislature to impose a tax on sales falling within its purview. To appreciate the contentions advanced on either side, it must be mentioned that the Act as passed in 1947 contemplated the imposition of a tax on residents within the State. They might be natural persons, or they might be juristic persons carrying on business within the State. The business might be carried on in person or through agents. But if the persons who carried on the business of buying and selling did not reside within the State or carry on business there, then the Act did not authorise the imposition of tax on them. That was the effect of the definition of "dealer" as meaning "any person who carries on the business of selling or buying goods in Bihar". Then came the Constitution, and the Explanation to Article 286 (1) (*a*) enacted that sales shall be deemed to have taken place in that State in which the goods are delivered for consumption, notwithstanding that title to them passed in another State. The construction which the respondent puts on the Explanation is that it confers on the States *proprio vigore*, a power to tax sales when the conditions mentioned therein are satisfied. Agreeably to this view, the Bihar Finance Act, 1950 (Act XVII of 1950) substituted for the words "who carries on business of selling or buying goods in Bihar" the words "who sells or supplies any goods". The point to be noted is that the words "in Bihar" which occurred in the previous definition were omitted. In 1951 by the Adaptation of Laws Order, a new section, section 33, was added, and that is as follows:

"33. (1) Notwithstanding anything contained in this Act,—

(*a*) a tax on the sale or purchase of goods shall not be imposed under this Act—

(i) where such sale or purchase takes place outside the State of Bihar ; or

(ii) where such sale or purchase takes place in the course of import of the goods into, or export of the goods out of, the territory of India ;

(*b*) a tax on the sale or purchase of any goods shall not, after the 31st day of March 1951, be imposed where such sale or purchase takes place in the course of inter-State trade or commerce except in so far as Parliament may by law otherwise provide.

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1. 1952 S.C.R. 572 : (1952) S.C.J. 162.
2. 1953 S.C.R. 1069 : (1953) S.C.J. 373 : (1953) 1 M.L.J. 743 (S.C.).
3. 1954 S.C.R. 1122 : 1954 S.C.J. 445 : (1954) 1 M.L.J. 690 (S.C.).

(2) The Explanation to clause (1) of Article 286 of the Constitution shall apply for the interpretation of sub-clause (i) of clause (a) of sub-section (1) ".

The contention of the respondent is that the appellant has become liable to be taxed under these provisions. The appellant replies that Article 286 (1) (a) is restrictive in its scope, that it merely takes away a power to tax which the State might otherwise possess, but that it does not positively confer on a State a power to tax where it did not previously exist, and that on its true construction, it would operate to divest Bengal of its power to tax but not to vest it in Bihar. To decide which of these two contentions is the correct one, it is necessary to examine what the law was prior to the enactment of Article 286 (1) (a) and the Explanation, what the defect was which was disclosed in the working of that law, and how it was proposed to remedy it.

Under the Government of India Act, 1935, the power to enact a law imposing tax on sale of goods was conferred on the Provincial Legislature by Entry 48 in List II. Under sections 99 (1) and 100 (3) that law must be for the Province, and as interpreted in *Wallace Bros.* v. *I. T. Commissioner, Bombay*[1], that meant that there should be sufficient territorial connection between the person proposed to be taxed and the State seeking to tax with reference to the subject-matter of the taxation. Dealing with this aspect of the matter, Patanjali Sastri, C.J., observed in *The State of Bombay* v. *The United Motors (India) Ltd.*[2] as follows:

" The expression 'for such State or any part thereof' cannot, in our view, be taken to import into Entry 54 the restriction that the sale or purchase referred to must take place within the territory of that State. All that it means is that the laws which a State is empowered to make must be for the purposes of that State . . . . In the case of sales-tax it is not necessary that the sale or purchase should take place within the territorial limits of the State in the sense that all the ingredients of a sale like the agreement to sell, the passing of title, delivery of the goods, etc., should have a territorial connection with the State. Broadly speaking, local activities of buying and selling carried on in the State in relation to local goods would be a sufficient basis to sustain the taxing power of the State, provided of course, such activities ultimately resulted in a concluded sale or purchase to be taxed ".

This statement of the law was again adopted by this Court in *Poppatlal Shah* v. *The State of Madras*[3]. *Vide* the observations of Mukherjea, J. (as he then was) at pages 682 and 683. In this view, a law of the State imposing a tax on sales must, to be valid, fulfil two conditions. Firstly, there must be a completed sale involving the transfer of title in the goods to the purchaser. It is only then that the power to tax arises. That was held by this Court in *The Sales Tax Officer, Pilibhit* v. *Messrs. Budh Prakash Jai Prakash*[4]. Secondly, there must be sufficient territorial nexus between the transaction and the State which seeks to tax it. This condition undoubtedly introduced an element of uncertainty and vagueness in the law with the result that the power to tax which was linked up with it, had indefiniteness which could lend itself to abuse. How expansive was the area open to the State Legislature to impose a tax on the basis of the nexus theory is forcibly brought out by Bose, J. in the following observations in *The State of Bombay* v. *The United Motors (India) Ltd.*[2] at page 1101:

" The difficulty is apparent when one begins to split a sale into its component parts and analyse them. When this is done, a sale is found to consist of a number of ingredients which can be said to be essential in the sense that if any one of them is missing there is no sale. The following are some of

1. 1948 F.C.R. 1 : L.R. 75 I.A. 86 : (1948) 2 M.L.J. 62 (P.C.).
2. 1953 S.C.R. 1069 : 1953 S.C.J. 373 : (1953) 1 M.L.J. 743 (S.C.).
3. 1953 S.C.R. 677: 1953 S.C.J. 369 : (1953) 1 M.L.J. 739 (S.C.).
4. (1955) 1 S.C.R. 243 : 1954 S.C.J. 573 : (1954) 2 M.L.J. 124 (S.C.).

them : (1) the existence of goods which form the subject-matter of the sale: (2) the bargain or contract which, when executed, will result in the passing of the property in the goods for a price; (3) the payment, or promise of payment, of a price (4) the passing of the title. When all take place in one State, there is no difficulty. The situs of the sale is the place in which all the ingredients are brought into being. But when one or more ingredients take place in different States, what criterion is one to employ ? It is impossible to say that any of these ingredients is more essential than any other because the result is always the same the moment you take one away. There is then no sale ".

Many were the problems which this state of the law created both for the State and for the consumers. Whether the fact on which a State law seeks to tax is sufficient nexus must, except in some obvious cases, be open to debate, and until a Court pronounces on it, there must be a cloud of uncertainty hanging over the validity of the enactment. More than that, when the several elements which go to make up a sale are distributed over different States it might happen that the same transaction might be subjected to tax by more States than one and the burden thereof must ultimately fall on the consumers. It was this, the possibility of multiple taxation that was the most serious defect in the law as it stood prior to the Constitution, and it was to remedy this that a new provision, Article 286 (1) (*a*) with its Explanation was enacted. It is as follows:

" 286. (1) No law of a State shall impose, or authorise the imposition of. a tax on the sale or purchase of goods where such sale or purchase takes place—

(*a*) outside the State.

Explanation.—For the purposes of sub-clause (*a*), a.sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State ".

It will be convenient hereafter to refer to the State in which title to the goods passes as the selling State, and the State in which goods are delivered for consumption as the delivery State.

Now, we may examine how this provision is designed to put an end to multiple taxation. The scheme of the enactment is to fix, what had not been done under the Government of India Act, 1935, the *situs* of the sale, and for that purpose, to classify it into two categories, sale inside the State and sale outside the State.. On what principle the *situs* was fixed will presently be considered. But when once that is done, the problem is solved. If a sale is inside a State, the power of that State to tax it under Entry 54 remains unaffected. But if the sale is outside a State, Article 286 (1) (*a*) prohibits that State from taxing it. This process must have the effect of eliminating multiple taxation, because a sale must be either inside or outside a State, and if it is inside one State it must be outside all other States. In this respect, Article 286 (1) (*a*) effected a fundamental alteration in the law under Entry 48 in List II and section 100 (3) of the Government of India Act, 1935, as construed by the Courts. Whereas under these provisions a State could tax irrespective of where a sale took place, provided there was sufficient territorial nexus, under Article 286 (1) (*a*) that power can be exercised only when it takes place inside the State, mere nexi being insufficient to support such a power. The theory of nexus as a source of jurisdiction to tax was thus abandoned, and the power to tax was annexed to the *situs* of the sale to be exercised by the State wherein it is fixed and as given sale can take place only in one State and in no other, it must follow that the power of taxing that sale is capable of exercise only by one State and not others.

The foundation on which this scheme rests is the location of a sale in a particular State. But how is this to be done? When all the essential ele-

ments of a sale take place within one State, the question presents no difficulty. But what, if they are distributed over several States? It is to deal with this situation that the Explanation has been enacted. Its purpose is to fix the *situs* of a sale when it is of an inter-State character, and it does that by providing that it shall be deemed to have taken place in that State in which the goods are delivered for consumption. What the significance of the words "for consumption" is, will be considered in due course. But that apart, it is delivery of the goods that has been adopted by the Constitution as the determining factor in fixing the *situs* of the sale, not the agreement to sell, nor the passing of title to the goods, nor other ingredients of sale, and there is good reason for this. Where an agreement to sell is concluded by correspondence as generally it must be when the transaction is of an inter-State character, difficult question might crop up as to where the agreement was concluded. Likewise, the conception as to passing of property in the goods is largely juristic and not seldom obscured by legal subtleties and refinements, and it is conceivable that there might be conflict among the States as to in which of them the title has passed. But delivery is a matter of fact, about which there ought to be no dispute, and it is consistent with the purpose of Article 286 (1) (*a*) that the Explanation should have chosen delivery as the determining element in the transaction of sale. Now, the question to be decided is whether in the light of the above discussion, the contention of the appellant that the Explanation operates only to deprive the selling State of its power to tax the sale, and that it confers no authority on the delivery State to impose a tax can be accepted. An obvious objection to this view might at once be stated. If the Explanation has no application to any but the selling State, it must follow that all the other States including the delivery State will have power to impose a tax under Entry 54 uncontrolled by the Explanation, and that will bring into play the nexus theory with its attendant evil of multiple taxation. On this contention, therefore, Article 286 (1) (*a*) must be held to have failed to achieve what it set about to do. A construction which leads to such a conclusion cannot be accepted unless there are cogent reasons therefor. What are those reasons? It is urged that Article 286 (1) (*a*) does not, in terms, purport to confer a power on the State to impose a tax on sale, that, on the other hand, it assumes the pre-existence of such a power in the State, and then proceeds to restrict it, that the substantive provisions which confer power to tax are Entry 54 in List II and Article 246 (3), that when a State has no power to tax under those provisions, then Article 286 (1) (*a*) could have no application as there could be no question of restricting what does not exist, and that it could not, therefore, operate to confer on it such a power. In support of this position, reliance is placed on the form of Article 286 (1) (*a*) that no law of a State shall impose a tax on outside sale. This prescription, it is argued, is merely negative and destructive and not positive and creative in its content.

But this contention does not give sufficient effect to the Explanation which is in substance and form positive, and it also fails to take adequately into consideration the purpose of the enactment. The object of Article 286 (1) (*a*) —and there is no dispute about it—is to avoid multiple taxation and that, as already stated, was sought to be achieved by fixing the *situs* of sale in one State in accordance with the Explanation. The scheme of the enactment must, by its very nature, have both a positive and a negative aspect. In so far as it lays down which of the several States could tax—and it does that in the Explanation—it is positive in its aspect, and in so far as it prohibits the other States from imposing tax—and it does this in the body of Article 286 (1) (*a*)—it is negative in its aspect. The body of Article 286 (1) (*a*) and the Explanation together form parts of a single enactment charged with a single purpose and to refer to it either as negative or positive in character can only be a partial and not

an accurate statement of the true position. It is no doubt true that Article 286 (1) (*a*) assumes that there is in the State a power to tax *aliunde*, and then proceeds to restrict it. But it is not inconsistent with this to construe the Explanation as positive in character. The problem of multiple taxation, which it is the object of the enactment to avoid, is possible only when the sale is of an inter-State character, and when the Explanation enacts that in such cases the sale shall be deemed to have taken place in the delivery State, that is at once a recognition and a declaration by the Constitution that delivery is sufficient nexus on which the State can tax the sale under Entry 54. The object of this declaration was to remove the question from the arena of controversy and settle it once and for all. It is thus a positive enactment and not the less so, because it is declaratory in character and it is also restrictive in that it takes away by necessary implication the power of taxation on the basis of other nexi which other States would have had under Entry 54. No purpose would be served by entering into a subtle disputation as to whether the Explanation conferred a new and substantive power, or whether it affirmed an existing power. In either case, the power of the delivery State to tax could not be challenged.

Looking at the form of the Explanation, it is emphatically positive in that it declares that the sale shall be deemed to have taken place in the delivery State, and that is all the more significant in view of the fact that the body of Article 286 (1) (*a*) to which it is appended is negative in form. The change-over from the negative of the body of Article 286 (1) (*a*) to the positive of the Explanation is highly significant, and the appellant has been unable to suggest any reason for this, except inadvertence and slovenliness on the part of the draftsman.

The marginal note to Article 286 was also referred to as showing that the Explanation was merely restrictive in character. In *Thakurain Balraj Kunwar* v. *Rae Jagat Pal Singh*[1] Lord Macnaghten observed:

"It is well settled that marginal notes to the sections of an Act of Parliament cannot be referred to for the purpose of construing the Act. The contrary opinion originated in a mistake, and it has been exploded long ago. There seems to be no reason for giving the marginal notes in an Indian statute any greater authority than the marginal notes in an English Act of Parliament".

The reason on which this rule rests was thus stated by Baggallay, L.J., in *Attorney-General* v. *G. E. Ry.*[2]:

"I never knew an amendment set down or discussed upon marginal notes to a clause. The House of Commons has nothing to do with a marginal note".

Vide also the observations of Lord Hanworth, M.R., in *Nixon* v. *Attorney-General*[3]. This reasoning applies with equal force to marginal notes in Indian statutes. In my opinion, the marginal note to Article 286 (1) (*a*) cannot be referred to for construing the Explanation. It is clearly inadmissible for cutting down the plain meaning of the words of the Constitution. Vide *Commissioner of Income-tax, Bombay* v. *Ahmedbhai Umarbhai & Co.*[4].

Two other views as to the scope of the Explanation which were discussed by the learned Attorney-General in the course of his argument must now be noticed. One is that the Explanation does not deprive the selling State of its power to tax under Entry 54 but confers additional power of taxation on the delivery State. And the other is that the Explanation merely settles the competing claims of the selling and of the delivery State, and leaves untouched the power of the other States to tax on the basis of the nexus theory. Neither of these views has been pressed by any of the parties before us, and both of them are open to the objection that they would result in multiple taxation, which it

1. (1904) L.R. 31 I.A. 132 at 142, 143 : I.L.R. 26 A. 393 (P.C.).
2. (1879) L.R. 11 Ch. D. 449, 461.
3. L.R. (1930) 1 Ch. 566 at 593.
4. 1950 S.C.R. 335 at 353 : (1950) S.C.J. 374 (S.C.).

was the purpose of the Explanation to avoid, and must in consequence be rejected. In the result, whether regard is had to the object of the enactment or its language, the Explanation must be held to authorise the imposition of tax by the delivery State.

3. It is next contended by the appellant that the sales covered by the Explanation to Article 286 (1) (*a*) are within the prohibition contained in Article 286 (2) and that in consequence the charge sought to be imposed on such sales by the impugned Act is illegal and void. That raises the question as to what the scope of the Explanation to Article 286 (1) (*a*) is, and whether it is controlled by Article 286 (2). The Explanation declaring as it does that the *situs* of a sale for purposes of taxation is the delivery and not the selling State can apply, by its very terms, only to sales of an inter-State character, and that is the basis on which the argument of both the parties to the appeal has proceeded. Article 286 (2) prohibits the imposition of tax on sales in the course of inter-State trade. Thus, the field on which the Explanation operates falls within the area covered by Article 286 (2), and there is apparently a conflict between them. Now the question is how the power of a State to tax on the basis of the Explanation is affected by the impact of Article 286 (2), and on that, three views have been put forward:

(*a*) The Explanation fixes the *situs* of the sale in the delivery State. It becomes thereby a sale inside that State and outside all other States. It accordingly ceases to be a sale in the course of inter-State trade and becomes an intra-State sale and is, therefore, outside the purview of Article 286 (2): and the power of the delivery State to tax under the Explanation remains unaffected. That was the view taken by the majority of the learned Judges in *The State of Bombay* v. *The United Motors (India) Ltd.*[1], and according to it, there is no conflict between the Explanation and Article 286 (2).

(*b*) The sales to which the Explanation applies are in the course of inter-State trade, and fall within the coverage of Article 286 (2), and there is thus a conflict between the two provisions, but the Explanation deals with a special topic, and therefore prevails against Article 286 (2) on the principle of *generalia specialibus non derogant*, and the power to tax thereunder is unaffected. That was the view taken by Bhagwati, J., in *The State of Bombay* v. *The United Motors (India) Ltd.*[1]

(*c*) The sales to which the Explanation applies are in the course of inter-State trade, and are hit by Article 286 (2) and unless Parliament lifts the ban as provided therein, no tax can be levied on them. According to this view, the two provisions are irreconcilably in conflict, and Article 286 (2) must prevail as against the Explanation unless its operation is superseded by Parliamentary legislation. This was the view taken by Bose, J. in *The State of Bombay* v. *The United Motors (India) Ltd.*[1], and by Das, J. in *State of Travancore-Cochin* v. *Shanmugha Vilas Cashew Nut Factory*[2]. The points for determination are thus whether there is conflict between the Explanation to Article 286 (1) (*a*) and Article 286 (2), and if so, which of them is to prevail. To decide this, it is necessary to examine first what the position was under the Government of India Act, 1935, and next how it has been affected by the provisions of the Constitution.

Under the Government of India Act, 1935, the Provinces had under Entry 48 in List II the exclusive power to make laws in respect of taxes on sale of goods, and under Entry 27, in respect of trade and commerce within its territory. There was no entry relating to trade and commerce among the Provinces though several topics relating to inter-State trade and commerce were specifically

1. 1953 S.C.R. 1069 : (1953) S.C.J. 373 : (1953) 1 M.L.J. 743 (S.C.).

2. 1954 S.C.R. 53 : (1953) S.C.J. 471 (1953) 2 M.L.J. 123 (S.C.).

enumerated in List I. Nor was there any provision for regulating inter-State commerce though under section 297 some restrictions were placed on the powers of the Provincial Legislature with reference thereto. The conception of a commerce clause, as we now have it, was unknown to the Government of India Act, 1935. It came in for the first time as part of the Constitution. To understand its true scope, it would be legitimate and indeed necessary to examine its bearings and incidents in other systems of law. The American Constitution is the oldest written Federal Constitution in the world, and the problems it had to deal with were what many Federal Governments have had since to face. The commerce clause is one of its notable provisions, and it was before the framers of the British North America Act, 1867 and of the Commonwealth Act of Australia, 1900. Our Constitution also has largely been influenced by it, and it would be useful to examine it to see what light it throws on the present controversy.

In America the authority of the Congress to enact laws on the matters delegated to it under the Constitution is supreme. In respect of all other matters, the States possess plenary powers of legislation subject to the inhibitions contained in the Constitution. It is in exercise of these powers that the States enact laws regulating sales and imposing tax on them. Under section 8 of Article 1 of the Constitution, the power "to regulate commerce among the States" is vested in the Congress. Thus, while intra-State commerce is within the exclusive jurisdiction of the State, inter-State commerce is within the exclusive jurisdiction of the Congress. A question which came up frequently for decision before the Courts was whether the State had the power to enact laws with reference to goods which had come into a State in the course of inter-State trade, and it was settled on the highest authority that if the sale was for the purposes of consumption within the State it became domestic in its character, and fell within the power of the State to regulate and to tax, but that if it was for purposes other than consumption such as resale, then that was in the course of inter-State commerce, and Congress alone had the jurisdiction to legislate in respect of it. In *Pennsylvania Gas Co.* v. *Public Service Commission*[1] the question was as to the validity of a statute of New York regulating the rates which could be charged for sale of natural gas for consumption within the State. The gas was transported into the State by pipe lines from outside, and it was accordingly held that the regulation was in respect of inter-State trade and commerce, and was therefore "subject to applicable Constitutional limitations" but that the State law was valid because "the thing which the State Commission has undertaken to regulate, while part of inter-State transmission, is *local in its nature,* and pertains to the furnishing of natural gas to local consumers within the city of Jamestown, in the State of New York". In *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*,[2] the facts were similar except that the sales were not for consumption within the State but for resale. It was held that those sales continued to retain the character of inter-State trade, and fell within the commerce clause. Vide also *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*[3] The principle underlying these decisions would appear to be that goods which are transported in inter-State trade must necessarily come to the end of their journey when they are consumed, and that, therefore, sales for consumption take them out of the course of inter-State trade. But if the goods are sold for resale, they are still moving in inter-State journey and therefore the commerce clause applies. In 1938 the Congress enacted a legislation with reference to sales in the course of inter-State trade for purposes of resale. Examining the question whether the States had thereafter the power to enact a law regulating sales which take place in the course of inter-State trade but

1. 252 U.S. 23; 64 L. Ed. 434.
2. 265 U.S. 298; 68 L. Ed. 1027.
3. 273 U.S. 83; 71 L. Ed. 549.

for local consumption, the Supreme Court held in *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of India*[1] that they had, and observed:

"Prior to that time (1938) this Court in a series of decisions had dealt with various situations arising from State efforts to regulate the sale of imported natural gas. The story has been adequately told and we do not stop to review it again or attempt reconciliation of all the decisions or their groundings. Suffice it to say that by 1938 the Court had delineated broadly between the area of permissible State control and that in which the States could not intrude. The former included inter-State direct sales to local consumers, the latter, service inter-State to local distributing companies, for resale".

It further held that the Congress legislation was itself a recognition of the distinction established by the decisions "between sales for resale and direct sale for consumption". This decision was followed quite recently in *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission.*[2] Four propositions might accordingly be taken as well-settled in American law:

(i) The States have plenary and exclusive power of legislation in respect of intra-State sales.

(ii) Regulation of inter-State commerce is a topic within the exclusive jurisdiction of the Congress.

(iii) Sales which take place in the course of inter-State trade are local in character and within the jurisdiction of the State, if they are for consumption within the State.

(iv) Where such sales are for other purposes than consumption such as resale, they retain their character as sales in the course of inter-State trade and are within the exclusive jurisdiction of the Congress.

The provisions of the Indian Constitution bearing on this subject may now be referred to:—

(*a*) The States have exclusive jurisdiction under Entry 54 to impose sales-tax and under Entry 26 to regulate trade and commerce within the State. Legislative powers in respect of these matters were conferred on the Provinces by the Government of India Act, 1935, and these powers have been continued in the States by the Constitution.

(*b*) Article 301 enacts that trade and commerce within the territory of India shall be free, and under Entry 42 in List I, the power to legislate on inter-State trade and commerce is vested exclusively in the Union. There was nothing corresponding to these provisions in the Government of India Act, 1935.

(*c*) Under the Explanation to Article 286 (1) (*a*), a sale is deemed to take place within the State in which the goods are delivered for consumption. This again is a new provision introduced in the Constitution.

(*d*) No law of a State can impose a tax on a sale which takes place in the course of inter-State trade. That is Article 286 (2) which is also a new provision.

Reading side by side the law on the subject both in America and under the Indian Constitution, it is difficult to avoid the conclusion that the Explanation to Article 286 (1) (*a*) and Article 286 (2) have been inspired by the American law on the subject, and that their spheres of operation correspond respectively to the jurisdiction of the State and of the Congress in America as delineated in *Missouri ex rel. Barett* v. *Kansas Natural Gas Co.*,[3] and *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of India.*[1]

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1. 332 U.S. 507: 92 L. Ed. 128.
2. 341 U.S. 329: 95 L. Ed. 993.
3. 265 U.S. 298: 68 L. Ed. 1027.

I shall now pass on to consider which of the three views which have been placed before us as to the effect of Article 286 (2) on the Explanation to Article 286 (1) (*a*) deserves to be accepted. The first view is that the sales falling within the Explanation are intra-State in character, and are therefore outside the area covered by Article 286 (2). This derives considerable support from the language of the enactment. The scheme of Article 286 (1) (*a*) is, as already stated, that it fixes the *situs* of the sale with a view to avoid multiple taxation, and for that purpose it divides them into two categories—inside sales and outside sales—and enacts that a State cannot tax an outside sale. When in the same context the Explanation declares that a sale in the course of inter-State trade—that this is its scope is common ground—must be deemed to have taken place in the State in which the goods are delivered for consumption, its purpose is clearly to take it out of inter-State trade and stamp it with the character of an intra-State sale. Under Entry 26 in List II, it is the State that has jurisdiction in respect of "trade and commerce *within the State,* and reading that with the language of the Explanation that the sales covered by it are deemed to take place *in the State,* the inference is irresistible that the intention of the Constitution-makers was to bring those sales within the exclusive jurisdiction of the State for purposes of taxation under Entry 54. The result is that with reference to sales for local consumption made in the course of inter-State trade, the law under the Constitution is exactly what it is in America and indeed, the similarity is too striking to be merely accidental. The position may thus be summed up: Article 286 (2) applies to sales in the course of inter-State trade. The sales which fall within the Explanation are intra-State sales. The grounds covered by the two provisions are distinct and separate. Each has operation within its own sphere, and there is no conflict between them.

The appellant resists this conclusion on several grounds, and they will now be considered. It was argued firstly that the conclusion that the Explanation and Article 286 (2) relate to two different subjects and that they operate on different fields could be reached only by importing the Explanation into Article 286 (2), and that could not be done because it is in terms stated to be "for the purposes of sub-clause (*a*)" and also because such a course could not be supported on any recognised rule of interpretation. Now, what is the significance of the words "for the purposes of sub-clause (*a*)" occurring in the Explanation? In the context, its purpose is only to exclude its application to Article 286 (1) (*b*). Article 286 (1) deals with two matters, sales outside the State and sales in the course of export and import. The former is dealt with in sub-clause (*a*) and the latter in sub-clause (*b*). If the Legislature intended that the Explanation should apply to the former and not to the latter, the most natural and obvious mode of expressing that intention would be to enact, as it has, that it is "for the purposes of sub-clause (*a*)". This problem would not have arisen if the two matters had been dealt with in two different clauses as logically they might have been. If that had been done, the Article simplifying it, would run as follows:

> "286. (1) No law of a State shall impose a tax on a sale, where it takes place outside that State.
>
> *Explanation*:—A sale shall be deemed to have taken place within that State where the goods are delivered for consumption as a direct result of the sale.
>
> * * * * * *
>
> 286. (4) No law of a State shall impose a tax on a sale in the course of export or import".

Article 286 (1) as drafted above, relegating sub-clause (*b*) to a separate clause and omitting the words "for the purposes of sub-clause (*a*)" in the Explanation would convey precisely the import of Article 286 (1) (*a*) as it now stands with sub-clause (*b*) and with the words "for the purposes of sub-clause (*a*)". That would clearly show that the force of the words "for the purposes of sub-

clause (*a*)" becomes spent when Article 286 (1) (*b*) is excluded from the operation of the Explanation.

But then, it is contended that whatever the form in which the Explanation may be couched, it could not be extended beyond Article 286 (1) (*a*) and projected into Article 286 (2), and that unless that was done, it was not possible to hold that the sales falling within the Explanation are taken out of the purview of Article 286 (2). In my opinion, this argument proceeds on a misconception of the real reasoning on which the conclusion that the Explanation and Article 286 (2) relate to two different subjects is based. In view of the insistence with which this contention was pressed by the appellant, it seems desirable to examine the position in some detail. To start with, the two relevant provisions to be considered are Article 286 (1) (*a*) with the Explanation and Article 286 (2). Omitting what is not material, they would run as follows:

286. (1) "No law of a State shall impose a tax on a sale, where it takes place outside that State.

Explanation : A sale in the course of inter-State trade is inside that State in which goods are actually delivered for consumption.

(2) No law of a State shall impose tax on a sale in the course of inter-State trade."

The argument of the appellant that Article 286 (2) is comprehensive and includes all sales in the course of inter-State trade and that therefore the sales covered by the Explanation fall within its purview, takes into account only Article 286 (2) and the Explanation, and it would have been unassailable if the question had to be decided on a construction only of these two provisions. But that, however, is not the position. An explanation appended to a section or clause gets incorporated into it, and becomes an integral part of it, and has no independent existence apart from it. There is, in the eye of law, only one enactment, of which both the section and the Explanation are two inseparable parts. "They move in a body if they move at all". When, therefore, the question is whether sales falling within the Explanation are comprised within Article 286 (2), what has to be construed is that Article in relation to, not merely the Explanation taken in isolation but to Article 286 (1) (*a*) read with the Explanation. If the matter is thus considered, the resultant position might thus be stated. Article 286 (1) (*a*) confers on States power to tax sales inside their territory. Article 286 (2) prohibits them from taxing sales in the course of inter-State trade. Explanation to Article 286 (1) (*a*) enacts that sales in the course of inter-State trade in which goods are delivered for consumption in a State shall be deemed to have taken place inside that State. The combined effect of all these provisions is that States can tax sales in the course of inter-State trade if they fall within the Explanation. This conclusion is reached, it will be seen, not by reading the Explanation into Article 286 (2) as a sort of exception but giving to all the provisions the status of independent enactments and determining what, on a construction of the language, their respective spheres of operation are.

In this view, the argument that if the Explanation could be read into Article 286 (2) it might as well be read into Article 286 (1) (*b*) and Article 286 (3) does not call for consideration. As the question is one of determining on a reading of the entire Article the precise operation of the several parts thereof, there can be no objection to examining the scope of Article 286 (1) including the Explanation in relation to Article 286 (1) (*b*) and Article 286 (3). Article 286 (1) (*a*) relates to sales inside a State, and Article 286 (1) (*b*) to sales in the course of export from or import into the country, and there could not be any interaction between them, and that is made abundantly clear by the words "for the purposes of sub-clause (*a*)" in the Explanation. Likewise, reading Article 286 (1) (*a*) including the Explanation along with Article 286 (3), the result is that the power to tax which the State otherwise possesses has to be exercised subject to

the 1st May, 1954 (Exhibit 1); that the appellant according to the respondent-Bank was the nominee of the said firm, and that his services had been dispensed with by the said firm whose employee he was and not by the Bank which had nothing directly to do with the employment of cashiers and other workers in the Cash Department which was in charge of the Treasurers described as "Contractor Treasurers". Hence the main question in controversy between the parties was whether the appellant was an employee of the Bank or of the said "Contractor Treasurers", whom we shall call the "Treasurers" for the sake of brevity. The Tribunal did not address itself to the determination of that question. This Court also did not discuss and decide the matter in Civil Appeal No. 66 of 1952,[1] but assumed that cashiers of the Bank were its employees. If that question had been decided by this Court, as the Tribunal erroneously thought this Court had, in Civil Appeal No. 66 of 1952,[1] the controversy would have been at an end. Therefore when the respondent preferred an appeal to the Appellate Tribunal, the Bank at the forefront of its attack against the award of the Tribunal raised the ground that the Tribunal had not determined the basic question which could have given jurisdiction to the Tribunal to decide the dispute whether the head cashier was an employee of the Bank or was a nominee of the "Treasurer" as contended on behalf of the Bank. The Bank relied very strongly before the Appellate Tribunal on the memorandum of agreement (Exhibit 1) and the correspondence that passed between the Bank and the "Treasurers" on the one hand and the latter and the appellant before us on the other (Exhibits 2, 3, 4 and 5).

The Appellate Tribunal rightly remarked that the Tribunal had recorded no finding on that basic question and had assumed that the respondent before it was an employee of the Bank. The Appellate Tribunal took the view that the agreement (Exhibit 1) was decisive of that question. After referring in great detail to the terms of the agreement the Appellate Tribunal came to the conclusion that the cashier was not an employee of the Bank but of the Treasurers and that therefore the Tribunal had no jurisdiction to give any relief to the complainant before it. The award by the Tribunal was, in the result, set aside and the Bank's appeal allowed.

The appellant in this Court through his counsel Shri Chari, argued that the Appellate Tribunal had misinterpreted the provisions of the Industrial Disputes Act in coming to the conclusion that the Tribunal had no jurisdiction to entertain the dispute simply on the ground that one of the parties to the dispute had successfully denied the relationship of employer and employee; that the Appellate Tribunal misconceived its functions by basing its findings on the interpretation of the written agreement between the Bank and its Treasurers when it should have gone into all the relevant facts to determine the substance of the matter; and finally, that the Appellate Tribunal misdirected itself on the question of the interpretation of the agreement for coming to the conclusion that the appellant was not an employee of the Bank but was a nominee of the "Treasurers". It was further argued on behalf of the appellant that the Tribunal having based its decision on its previous award dated the 16th September, 1952, in Reference No. 3 of 1951 between persons more or less in the same position as the appellant and the respondent-Bank, in the back-ground of the decision of the previous Tribunals, *e.g.*, the award of the Conciliation Board presided over by Mr. Justice Bind Basni Prasad of the Allahabad High Court, the award by the Tribunal presided over by Mr. K. C. Sen and the award of the All India Industrial Tribunal (Bank Disputes), presided over by Sri S. Panchapagesa Sastri and the award dated the 24th March, 1951, in Reference No. 20, the award of the Tribunal was really final. The argument was that the award of the Tribunal was based on considerations of facts and circumstances disclosed in those earlier awards to which the Bank and its cashiers and other employees employed in the Cash Department were parties. It was thus a final finding of fact which was not open to appeal before the Appellate Tribunal. It was therefore contended that the Appellate Tribunal had no jurisdiction to entertain the appeal and to reverse the award of the Tribunal.

1. Reported in A.I.R. 1953 S.C. 437.

On behalf of the respondent-Bank it was contended that no specific grounds had been taken either before the Appellate Tribunal or in the memorandum of appeal to this Court that the Appellate Tribunal had no jurisdiction on the ground now taken by the appellant in this Court, nor was that ground taken in the statement of case. On merits it was contended by the respondent's counsel that the Tribunal is as much bound by the rules of evidence and procedure as any other Tribunal and as the Tribunal had not addressed itself to the question whether the cashier-appellant was an employee of the Bank, the question was open before the Appellate Tribunal which was competent to pronounce on that basic question. Finally it was argued that on a true construction of the provisions of the agreement (Exhibit 1) this Court should accept the finding of the Appellate Tribunal that the appellant was not an employee of the Bank and that on that account the Tribunal had no jurisdiction to grant any relief to the appellant.

On behalf of the respondent the case was practically rested on the construction of the agreement (Exhibit 1). With reference to the terms of the agreement the learned counsel for the respondent argued that the Treasurers were not servants or employees of the Bank but were "independent contractors" and that the appellant and other employees in the Cash Department having been nominees of the "independent contractors", there could not be any relation of employer and employee between the Bank and the appellant. It is therefore necessary to examine in some detail the terms of the agreement aforesaid. We set out below, underlining important words, the terms of the agreement in so far as they are relevant for the determination of the true relation between the Bank and the Treasurers. Though this agreement is dated the 1st May, 1944, clause (1) provides that it will be deemed to have commenced and come into force from the 15th March, 1942, the date of the death of R. B. Karam Chand Puri and will take the place of the previous agreement dated the 26th July, 1941, thus maintaining the continuity of the relationship between the Bank and the Treasurers. The agreement provides that the Treasurers shall *diligently and faithfully serve the Bank* at the Head Office and its various offices mentioned in schedule A attached to and forming part of the agreement and at other offices where they may hereafter be appointed treasurers and shall in all respects *diligently and faithfully obey and observe all lawful orders and instructions* of the Bank or the person placed by the Bank in authority over them in relation to the due discharge of their duties as Treasurers. The Treasurers in addition to the duties, liabilities and responsibilities devolving upon them by virtue of the provisions of the agreement shall also be liable to perform such duties and discharge such responsibilities as by custom usually devolve on treasurers *in the employ of a bank*. The Treasurers *shall be paid for their services a remuneration* as mentioned in schedule A aforesaid or such remuneration as the General Board of Directors of the Bank may determine from time to time. Out of the remuneration paid to them by the Bank *the Treasurers shall pay salaries to their nominees employed by them* for performing the duties of a cashier in the Bank on their behalf or other functionaries of a similar nature. The salaries of such nominees employed by them will be fixed by the Treasurers themselves but the same will be subject to the approval of the Bank. The remuneration of the Treasurers will be the net amount which will be left to them after paying *salaries to their nominees employed by them for working as cashiers, etc.* The Treasurers themselves will not be entitled to any kind of allowances besides the net remuneration as aforesaid but *their nominees or working cashiers will be entitled to allowances which the authorities of the Bank may sanction for members of the staff from time to time.* The Treasurers shall employ the number of men at each office as mentioned in schedule A aforesaid. The Board of Directors shall have the powers to increase or decrease the number of their nominees for any particular office and the amount of remuneration fixed for that office. The Treasurers, shall be responsible for the due safety, both within and outside the premises of the Bank at any office placed under their charge, of all money, specie, ornaments, bullion, cash, etc. and of other valuable documents received by them for and on behalf of the Bank or from the Bank and shall be answerable to the Bank for all losses occurring either inadvertently or by or through the negligence or misconduct

of the Treasurers or any of their nominees. The Treasurers shall be *entitled to resign the services of the Bank* by giving three calendar months' notice to the Bank. The Bank shall also be entitled to *dispense with the treasurers' services* on giving three months' notice. In case of gross negligence or misconduct or of any fraud, misappropriation or embezzlement by the Treasurers or any of the nominees in the discharge of their duties as such treasurers, no notice shall be necessary and the *Bank shall have the right to dispense with their services forthwith.* The Bank shall have the right to take *the Treasurers into the service of the Bank after settlement of remuneration* with the Treasurers at any other office or offices of the Bank. *The Treasurers and their nominees shall obey all the orders, rules and regulations prescribed by the Bank* with regard to the discharge of their duties by the cashiers as well as with regard to the amount of balance they are allowed to keep with them. It shall be the duty of the cashiers to inform the manager of the Bank as soon as the balance in hand exceeds the prescribed limit and to ask for orders on the point. The *Treasurers shall not engage any person* as their assistant or peon about whose character, conduct or reliability the manager or the Board of Directors of the Bank may have any objection. The Treasurers shall also arrange that no person under employment absents himself from duty without the written permission of the manager for the time being. If any such employee is abesent without leave, or he is turned out on the objection of the Board or the Manager, the Treasurers shall forthwith appoint a substitute in his place. The Treasurers shall be responsible for the acts and defaults of all their nominees. The Treasurers and their nominees shall be *entitled to travelling allowance* according to rates sanctioned by the Board of Directors of the Bank. The Treasurers have deposited security of the value of Rs. 15,000 on which they shall be entitled to receive interest at the rate of 3½ per cent. per annum. As a further security for the due performance of the terms and conditions of the agreement as a cover for loss that may be caused to the Bank by any act or omission of themselves or any one of their nominees, the Treasurers hypothecated properties as per schedule C attached to and forming part of the agreement. Schedule A aforesaid contains the names of the offices, the monthly remuneration of the Treasurers in respect of each one of those offices separately, net savings of the Treasurers after paying the salaries of the total number of men including cashiers, etc., as stated against each one of the offices.

Apart from the terms set out above bearing on the relation between the Bank and the Treasurers, some of which apply equally to their nominees, the following terms of the agreement bear directly on the relation between the nominees of the Treasurers, like the appellant, and the Bank. In this connection the agreement provides that the Board of Directors shall have the power to increase or decrease the number of the Treasurers' nominees for any particular office and the amount of remuneration fixed for that office. Such nominees shall be entitled *as servants of the Bank to any bonus* which may from time to time be declared for the members of the staff. The bonus of the Treasurers shall be limited to the amount of their own net remuneration and no further. They shall not be entitled to any bonus to which their cashiers are not eligible under the rules of the Bank. The nominees of the Treasurers shall be entitled to participate *as ordinary members of the staff in the provident fund* constituted by the Bank. Such nominees shall also be *entitled to travelling allowance* according to rates sanctioned by the Board of Directors of the Bank whenever they are required to go to outstations on bank business.

From the terms of the agreement aforesaid set out above almost verbatim omitting such clauses and words as are not relevant to this case, it will appear that the Treasurers are under the employment of the Bank on a monthly basis for an indefinite term, that is to say, until such time as either party to the agreement terminated it in accordance with the terms quoted above. They are under the complete control and direction of the Bank through its manager or other functionaries. The Treasurers have to take their orders from day to day as regards the cash balance or other cognate matters relating to the safe custody of cash, valuable documents, etc. belonging to the Bank or its constituents. The Treasurers receive in respect of each office under their charge a certain named

sum out of which they have to pay the salary of a stated number of their assistants who may be head cashiers or cashiers or assistant cashiers and other such functionaries. They are entitled to receive bonus on the net amount secured to them as their remuneration, being the lump sum fixed in respect of each office, minus the salary of the assistants. It is true that these treasurers are not and cannot be expected to be personally present to discharge their onerous duties at each one of the large number of offices spread over the Punjab and outside. Naturally hey had to be authorized to engage head cashiers, cashiers or assistant cashiers in respect of each of the offices placed in their charge. They had to guarantee the fidelity of the persons so employed as their assistants. Those assistants had to be persons in whose reliability, honesty and efficiency both the Bank and the Treasurers had confidence. The Treasurers have the right to nominate those assistants but the Bank had the final word in the choice. The Bank Manager has complete control over such nominees in the matter of leave of absence, discipline and conduct in the discharge of their duties as assistants managing the cash and other valuables in the custody of the Bank. From the very nature of things it had to be a dual control in the sense that the Treasurers had to nominate the assistants who are to discharge those responsible functions in connection with cash and other valuables of the Bank and the Bank could not abdicate its powers of full control over the day to day working of the Cash Department. The nominees of the Treasurers are treated on the same footing as the other servants of the Bank in the matter of bonus, travelling allowance and provident fund, etc. It is true those nominees are to be paid by the Treasurers but it is out of the money provided by the Bank.

It is not always easy to determine whether the relation between two parties, in the present case of the Treasurers *vis-a-vis* the Bank, is that of servants to a master or of independent contractors who have undertaken to do a particular job for their employer. The question has generally arisen in connection with the determination of vicarious liability of an employer in respect of acts done by his agent (using a neutral word which includes an independent contractor as also a servant). The distinction between a servant and an independent contractor has been the subject matter of a large volume of case-law from which the text-book writers on torts have attempted to lay down some general tests. For example, in Pollock's Law on Torts,* the distinction has thus been brought out :—

"A master is one who not only prescribes to the workman the end of his work, but directs or at any moment may direct the means also, or, as it has been put, 'retains the power of controlling the work', a servant is a person subject to the command of his master as to the manner in which he shall do his work. . . . .

An independent contractor is one who undertakes to produce a given result but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand . . . ."

Clerk & Lindsell on Torts (11th edition) at page 135 have adopted the description of an independent contractor given by Pollock as quoted above.

In the 11th edition of Salmond's Treatise on the Law of Torts, the same distinction has been clearly indicated in the following passage at page 98 :—

"What then, is the test of this distinction between a servant and an independent contractor? The test is the existence of a right of control over the agent in respect of the manner in which his work is to be done. A servant is an agent who works under the supervision and direction of his employer; an independent contractor is one who is his own master. A servant is a person engaged to obey his employer's orders from time to time ; an independent contractor is a person engaged to do certain work, but to exercise his own discretion as to the mode and time of doing it—he is bound by his contract, but not by his employer's orders".

Those learned authors have discussed in great detail cases illustrative of these distinctions, indicating the circumstances in which the general rule has been applied to individual cases with such modifications as the facts and circumstances of a particular case required. We are here not concerned with those nice distinctions which have been drawn in connection with the rule of vicarious liability in torts.

* Pages 62 and 63 of Pollock on Torts, 15th Edition.

We are here concerned only with the question how far the test laid down by the standard authors as quoted above can be applied to determine the present controversy whether the Treasurers of the Bank were its servants as contended on behalf of the appellant or independent contractors as claimed on behalf of the respondent-Bank. The agreement between the parties, as summarised above, is a composite transaction constituting the Treasurers agents of the Bank, the former agreeing to indemnify the latter against any loss occasioned to the Bank due to the lack of fidelity and efficiency of the ministerial staff entrusted with the charge of the Bank's cash and valuable documents. The Treasurers have been charged with the duty of nominating their assistants who are to be responsible in their day to day work to the Bank which all the time has full control over them in the matter of their leave of absence, as to how they shall keep the cash and other valuables and as to how they shall be under the general direction of the Bank's manager or some other functionary who may be nominated by the Bank to supervise the work of the Cash Department. The Bank makes itself answerable to the employees thus appointed by the Treasurers with the concurrence of the Bank for their bonus, provident fund and travelling allowance. For those purposes these assistants are to be on the same footing as the other employees of the Bank.

It was contended on behalf of the respondent Bank that its agreement with the Treasurers shows that the latter had the fullest responsibility for the appointment and dismissal and payment of salary of the employees in charge of the Cash Department of the Bank and that therefore the Treasurers could not but be independent contractors. It has already been noticed that the appointment of such assistants as are entrusted with the work of the Cash Department is not under the absolute power of the Treasurers. The appointment has to be approved by the Bank and the Treasurers cannot continue to employ those workmen in whose fidelity and efficiency the Bank has no confidence. Hence both in the matter of appointment and dismissal of the employees the Bank reserves to itself the power to give direction to the Treasurers. Similarly in the matter of the payment of salary the money comes out of the coffers of the Bank, though it may be paid by the hand of the Treasurers. In this connection it was contended on behalf of the appellant that payment of salary of the employees in the Cash Department is made through the Bank itself but we have no tangible evidence in this case beyond the bare assertion at the Bar. But, in our opinion, the situation in respect of the appointment, dismissal and payment of salary of he employees of the Cash Department is analogous to that of the employees of a particular department of Government, in which appointment and dismissal of ministerial staff may rest with an authority so empowered by the head of the department. Payment of salary may also be made by the appointing authority but the money comes out of the Government treasury. In those circumstanc s, can it be rightly asserted that those employees are not the servants of Government? The analogy may not be perfect, because, in the present case, the appointment and dismissal of the employees of the Cash Department is the joint responsibility of the Bank and its Treasurers. It has got to be so because the Treasurers are the guarantors of the fidelity and efficiency of the employees and the Bank has to exercise complete control over the day to day discharge of their functions because it is the Bank which is vitally and immediately concerned with the efficient and honest discharge of the duties of the assistants in the Cash Department, the efficient running of which is the most important of a bank's functions.

It will further be noticed with reference to the terms of the agreement set out above that whereas the Treasurers and their nominees have to take their orders from the Bank Manager or other such functionary, there is no specific provision that those nominees shall discharge their day to day functions under the direct control of the Treasurers or that they will be subject to the immediate control of the Treasurers in the discharge of their daily duties and in the matter of the grant of leave of absence. There could not be such a provision, as a dual control of that kind in the daily work of the employees would lead to a great deal of confusion and lack of discipline amongst the ministerial staff. The employees of the Cash

Department have of necessity to be under the direct control of the Bank Manager or of some other functionary appointed by the Bank. It is the Bank which has undertaken the responsibility in the matter of their pay and prospects in the service and naturally therefore, such employees, even as other employees of the Bank have to take their orders from the Bank. It must therefore be held that the Treasurers are the servants of the Bank and that their nominees must equally be so.

The Appellate Tribunal held that on a reading as a whole of the clauses of the agreement aforesaid the appellant was an employee of the Treasurers and not of the Bank. It did not address itself pointedly to the question as to what was the exact relation between the Bank and the Treasurers. It did not also consider the question as to what would be the position of the employees of the Cash Department *vis-a-vis* the Bank if it w re held that the Treasurers themselves were the servants of the Bank and not independent contractors. Before the Appellate Tribunal both parties appear to have concentrated their attention on the question as to whether the employees of the Cash Department were servants of the Bank or of the Treasurers. In our opinion, that was not a correct approach to the determination of the controversy between the parties. If the Treasurers' relation to the Bank was that of servants to a master, simply because the servants were authorized to appoint and dismiss the ministerial staff of the Cash Department would not make the employees in the Cash Department independent of the Bank. In that situation the ultimate employer would be the Bank through the agency of the Treasurers. It was argued on behalf of the respondent that even if it were held that the Treasurers were the servants of the Bank and not independent contractors, the legal position of the employees of the Cash Department *vis-a-vis* the Bank would be the same, namely, that they will be in law the servants of the Treasurers. In our opinion, there is no substance in that contention. If a master employs a servant and authorizes him to employ a number of persons to do a particular job and to guarantee their fidelity and efficiency for a cash consideration, the employees thus appointed by the servant would be equally with the employer, servants of the master. It is not always correct to say that persons appointed and liable to be dismissed by an independent contractor can in no circumstances be the employees of the third party. This would be clear from the following observations of Lord Esher, M.R., in the case of *Donovan* v. *Laing, Wharton, & Down Construction Syndicate*[1]—

"It is true that the defendants selected the man and paid his wages, and these are circumstances which, if nothing else intervened, would be strong to show that he was the servant of the defendants. So, indeed, he was as to a great many things ; but as to the working of the crane he was no longer their servant, but bound to work under the orders of Jones and Company, and, if they saw the man misconducting himself in working the crane or disobeying their orders, they would have a right to discharge him from that employment".

Those observations have been approved in the latest decision of the House of Lords in the case of *Mersey Docks & Harbour Board* v. *Coggins & Griffith (Liverpool) Ltd.*[2]. The House of Lords distinguished that ruling on facts but did not depart from the general rule laid down in the earlier decision that the determinative factor is as to which party had control over the workers as to how they would do their job from day to day. Lord Macmillan in his speech at page 14 has observed as follows :

"Many reported cases were cited to your Lordships but where, as all agree, the question in each case turns on its own circumstances, decisions in other cases are rather illustrative than determinative. So far as attempts have been made to formulate a criterion of general application, it cannot be said that these attempts have been very successful".

It would thus appear that the question as to whose employee a particular person was has to be determined with reference to the facts and circumstances of each individual case. Lord Porter in the course of his speech in the reported case (*supra*).at page 17 has observed as follows :—

"Many factors have a bearing on the result. Who is paymaster, who can dismiss, how long the alternative service lasts, what machinery is employed, have all to be kept in mind. The expressions

1. (1893) 1 Q.B.D. 629 at 632. 2. L.R. (1947) A.C. 1.

used in any individual case must always be considered in regard to the subject matter under discussion but amongst the many tests suggested I think that the most satisfactory, by which to ascertain who is the employer at any particular time, is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged ".

As indicated above, in the present case the direction and control of the appellant and of the ministerial staff in charge of the Cash Department of the Bank was entirely vested in the Bank through its manager or other superior officer. We have therefore no hesitation in differing from the conclusion arrived at by the Appellate Tribunal and in holding that the appellant was an employee of the Bank. That being so, the Tribunal had the jurisdiction to make the directions it did in respect of the appellant. The respondent did not at any stage of the proceedings challenge the orders of the Tribunal on its merits. That conclusion being reached, there is no difficulty in upholding the orders of the Tribunal in respect of the appellant. It is therefore not necessary to pronounce upon the other points raised by the parties. The appeal is accordingly allowed with costs throughout.

G.R./K.S. *Appeal allowed.*

[END OF VOL. (1955) I M.L.J. (S.C.)].

the conditions mentioned in the latter, when there is a Parliamentary declaration thereunder. The impact of Article 286 (3) is, it should be noted, not confined to the Explanation but extends to the whole of Article 286 (1) (*a*). It operates not only on the inter-State sales falling within the Explanation but also on sales which are indisputably intra-State, and it controls both of them on the principle of *generalia specialibus non derogant*.

It is next contended that the sales to which the Explanation applies, takes place as a fact in the course of inter-State trade, and that the Explanation could not be construed as altering that fact, and that its true scope was merely to shift the *situs* of the sale from the selling to the delivery State. Conceiving inter-State trade as a stream flowing from point A in the selling State to a point B in the delivery State, it was argued that what the Explanation did was to shift the *situs* of the sale from point A to point B, that the stream was still there despite the shifting and that the sale therefore did not cease to be in the course of inter-State trade. With respect, the fallacy in this argument lies in thinking that after the shifting of the *situs* from point A to B, the sale could be regarded as one in the course of inter-State trade. A sale could be said to be in the course of inter-State trade only if two conditions concur: (1) A sale of goods, and (2) a transport of those goods from one State to another under the contract of sale. Unless both these conditions are satisfied, there can be no sale in the course of inter-State trade. Thus, if *X*, a merchant in State A goes to State B, purchases goods there and transports them into A, there is undoubtedly a movement of goods in inter-State commerce. But that is not any contract of sale. *X* might be entitled under Article 301 to certain rights in the matter of transportation. But Article 286 (2) has no application, as there is no sale in the course of inter-State trade or commerce. In the same illustration, if *X* after transporting the goods into State A sells them, then also there is no sale in the course of inter-State trade. It is true that there is a sale, and there is also a movement of goods from one State to another. But that movement has not been under the sale, there having been no sale at the time of transportation. In Rottschaefer on Constitutional Law (1939 Edition) sale in the course of inter-State commerce is thus defined:

> "The activities of buying and selling constitute inter-State commerce if *the contracts therefor contemplate or necessarily involve the movement of goods in inter-State commerce*".

The law is thus stated by Gavit in "Commerce Clause" (1932 Edn.) :—

> "The dividing line between an inter-State sale and intra-State sale is rather fine, although clear. If the goods are shipped into a State without a previous sale, any sale within the State is intra-State commerce.
>
> ....
>
> Thus if the sale succeeds the transportation in point of time, however close, the State may license it".

In *William T. Wagner* v. *City of Covington*,[1] it was held that local sales of goods brought into the State from outside for the very purpose of the sale were not parts of inter-State commerce. The following observations at page 197 might be quoted:

> "Of course the transportation of plaintiffs' goods across the state line is of itself inter-State commerce; but it is not this that is taxed by the City of Covington, nor is such commerce a part of the business that is taxed, or anything more than a preparation for it. So far as the itinerant vending is concerned the goods might just as well have been manufactured within the State of Kentucky; to the extent that plaintiffs dispose of their goods in that kind of sales, they make them the subject of local commerce; and this being so, they can claim no immunity from local regulation, whether the goods remain in original packages or not".

In the light of the above principles, what is the legal character of the sales effected by the appellant and sought to be taxed by the respondent? There is

1. 252 U.S. 95 : 64 L. Ed. 157.

firstly the fact that the goods were actually delivered in Bihar, and secondly, there is the fiction enacted by the Explanation that the sale had taken place not in Bengal but in Bihar. If both sale and delivery are in Bihar, it is difficult to see how the sale can be said to be in the course of inter-State trade. The argument of the appellant that there was, in fact, a movement of goods from Bengal to Bihar and that stood unaffected by the fictional shifting of the *situs* of the sale from Bengal to Bihar, overlooks that by this very shifting, the character and complexion of the sale become altered, because as the sale follows the transport of goods, it cannot, according to the principles already stated, be said to be in the course of inter-State trade. It may be urged as against this conclusion that as the Explanation to Article 286 (1) (*a*) merely shifts the *situs* of the sales, and leaves unaffected the agreements to sell which must in the present case be held to have been made at Calcutta when the appellant executed the orders received from the Bihar purchasers, the transport of goods from Bengal to Bihar was under the above contracts to sell, and that therefore the sales were in the course of inter-State trade. Such a contention would be untenable, because the expression "contract of sale" in this context has the same meaning as the words "contract of buying and selling" in the definition of inter-State commerce given by Rottschaefer in the passage already quoted, and they both refer to the bargain resulting in the sale irrespective of whether it is in the stage of an agreement to sell, or whether it is a sale in which title to the goods has passed to the purchaser. That is also the definition of 'contract of sale' in section 5 (1) of the Indian Sale of Goods Act. As there can be only one final and concluded bargain in respect of any particular sale, and as that is fixed by the Explanation at Bihar, it follows that there could not be any bargain with reference thereto in Calcutta, and the movement of goods from Bengal to Bihar was not under any contract of sale. The position in law is exactly the same as if the goods had been sent by the seller from Bengal to Bihar on his own account and then sold there and delivered to the purchaser, in which case it would be indistinguishable from *William T. Wagner* v. *City of Covington*[1], and the sale would clearly be intra-State. This conclusion does not negative the factum of inter-State movement of goods, and does not prevent any rights being put forward on that footing under Article 301. It only negatives the notion of a sale in the course of inter-State trade, and thus takes it out of the purview of Article 286 (2).

It was argued that the Explanation merely enacted a legal fiction, and that it being a well-established rule of construction that legal fictions should be limited to the purpose for whirh they are enacted, it would be contrary to this rule to hold that the Explanation not merely shifted the *situs* of the sale but also obliterated the course of inter-State commerce. But the conclusion that the sales covered by the Explanation cease to be in the course of inter-State trade is not the result of any extension of the fiction because, as already stated, the factum of inter-State transportation is not ignored. That is the legal consequence of the fictional shifting of the *situs*. It will be useful in this connection to quote what Lord Asquith observed in dealing with a similar contention in *East End Dwellings Co. Ltd.* v. *Finsbury Borough Council*[2];

> "If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. One of these in this case is emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

It is next contended that the view that sales in which goods are delivered for consumption within the State are not within Article 286 (2) would render that provision practically useless, because sales for purposes other than consumption

1. 251 U.S. 95: 64 L. Ed. 157.
2. L.R. (1952) A.C. 109, 132.

such as for resale must be very few and negligible. Why should a seller for consumption, it is asked, get his goods from an intermediary and not directly from the manufacturer? But then, the Constitution has itself recognised in clear and unmistakable terms a distinction between sales in which goods are delivered for consumption and sales in which they are delivered for purposes other than consumption such as re-sale, and what purpose this distinction serves, the appellant has been unable to explain. Besides, what are the materials on which we can brush it aside on the ground that it is not one of substance? One of the developments of modern big business is the agency system under which middlemen enter into contracts with manufacturers, stipulate for monopoly of the distribution rights within a specified area, guarantee a certain volume of business, and are granted liberal commission on the sales. In such cases, retail sellers can get the goods only from the distributors, and even when there is no grant of monopoly, it is nothing unusual in business that large distributors are able to get the goods from the manufacturers on rates more favourable than retail sellers can obtain and that consequently, it is more economical for the latter to buy them from the distributors than from the manufacturers. And it is not without significance that the distinction between the two classes of sales has been recognised in commercially advanced America for now nearly a century and recognised for this very purpose; and how can such a distinction be characterised as unsubstantial?

It was finally contended by the learned Attorney-General that if Article 286 (2) were to be construed as not comprehending sales falling within the Explanation, then there would be nothing on which it could operate. The argument was thus presented: Article 286 (1) (*a*) bars the selling State, in the present case Bengal, from taxing the sale because by reason of the Explanation, it becomes an outside sale, and if Article 286 (2) is to be construed as not barring the delivery State, in the instant case Bihar, from taking the sale, then there is no sale to which it can apply, and it will serve no purpose. The error in this argument lies in taking the illustration as exhausting the entire range of inter-State trade. But that is not correct. Inter-State commerce consists in a flow of goods not merely from one State to another but in its continuous flow through several States, and Article 286 (2) is designed to protect such a flow without being burdened by State taxes. Thus, if *A* in Bengal sells to *B* in Bihar, and if in his turn *B* sells the same goods to *C* in U. P. for local consumption, there will be inter-State commerce under Article 286 (2) and in the course thereof, there will be two sales. Taking first the sale from Bengal to Bihar, Bengal can tax it under Article 286 (1) (*a*) because the Explanation thereto is not applicable as the delivery to Bihar is not for local consumption. But Article 286 (2) would interpose a bar. Bihar cannot tax the sale under Article 286 (1) (*a*), because that is an outside sale, the Explanation being inapplicable. Coming next to the sale by Bihar to U. P., Bihar will be entitled to tax it under the body of Article 286 (1) (*a*) as the sale took place inside its limits. But it cannot do so as under the Explanation, it becomes an outside sale. But U.P. will be entitled to tax the sale under the Explanation as it was for consumption within that State. Thus, the effect of the combined operation of both Article 286 (2) and Article 286 (1) (*a*) read with the Explanation is that the only State which can tax the sale is the one in which the goods are sold for local consumption.

These are the objections advanced by the appellant against the view that the sales covered by the Explanation are outside Article 286 (2), and they are not of sufficient weight to overthrow it.

The consideration of this question will, however, be incomplete without an examination of the other two views that have been put forward as to the true meaning and scope of Article 286 (2). The second view—and that was taken

by Bhagwati, J., in *The State of Bombay* v. *The United Motors (India) Ltd.*[1]— is that the sales covered by the Explanation are in the course of inter-State trade and they are, therefore, within the purview of Article 286 (2), but that as the latter is a general provision covering all sales in the course of inter-State trade, and the former deals only with a special class thereof, the maxim *generalia specialibus non derogant* applies, and the Explanation prevails as against Article 286 (2). It will be noticed that this agrees with the first view in its conclusion but it differs from it on the reasoning by which it reaches it. According to the first view, sales in the course of inter-State trade contemplated by Article 286 (2) include only those under which goods are delivered for purposes other than local consumption; whereas according to the second, they include all sales including those in which goods are delivered for consumption within the State and those in which they are delivered for other purposes. According to this view, therefore, there is conflict between the Explanation and Article 286 (2), and the solution for it is to be sought in the application of the rule of contruction that general provisions do not derogate from the special. As between these two views, the first view is, for the reasons already given, to be preferred. But if the contention that Article 286 (2) applies both to sales in which goods are delivered for local consumption and those in which they are delivered for other purposes is correct, then it is difficult to see how the appellant can escape the conclusion reached by Bhagwati, J., in *The State of Bombay* v. *The United Motors (India) Ltd.*[1] The appellant is plainly in the horns of a dilemma. Sales in which goods are delivered for local consumption fall either outside Article 286 (2) or inside it. If they fall outside Article 286 (2), then the appellant can claim no immunity from taxation under that provision. In case they fall inside Article 286 (2), then the Explanation must prevail as against it on the principle *generalia specialibus non derogant*, and the sales will be liable to be taxed. To get out of this difficulty, the appellant contended that Article 286 (2) and the Explanation related to two different matters, and therefore the maxim in question had no application. The argument was that Article 286 imposed a number of restrictions on the power of the State to tax sale of goods from different angles, *e.g.*, when they were outside the State, Article 286 (1) (*a*); in the course of export or import, Article 286 (1) (*b*); in the course of inter-State trade, Article 286 (2); and in relation to commodities declared essential by Parliamentary legislation under Article 286 (3); that the Explanation was enacted from the standpoint whether the sales were outside or inside and Article 286 (2) from the standpoint whether they were in the course of inter-State trade or intra-State trade, and that the purpose and the policy of the two provisions being different, their subject-matter must be held to be different and that therefore the maxim was inapplicable.

I see no force in this contention. It is a cardinal rule of construction that when there are in a Statute two provisions which are in conflict with each other such that both of them cannot stand, they should, if possible, be so interpreted that effect can be given to both, and that a construction which renders either of them inoperative and useless should not be adopted except in the last resort. This is what is known as the rule of harmonious construction. One application of this rule is that when there is a law generally dealing with a subject and another dealing particularly with one of the topics comprised therein, the general law is to be construed as yielding to the special in respect of the matters comprised therein. Now, the reason of the rule requires that it should apply whenever there is overlapping of the fields occupied by two conflicting enactments, and when that is shown, it would not be logical to exclude its application on the ground that the enactments have been made with a different purpose. It is the identity of the subject-matter of the conflicting provisions, not the identity

1. (1953) S.C.R. 1069: (1953) S.C.J. 373 : (1953) 1 M.L.J. 743 (S.C.).

of their purpose or angle of vision that is essential for the application of the maxim. No authority was cited for limiting it in the manner contended for by the appellant. Now, it is the appellant's own contention that the sales covered by the Explanation are within the purview of Article 286 (1) (*a*), and are therefore exempt from taxation thereunder, and that such taxation would be permissible only when the hold of Article 286 (2) over the Explanation is removed by Parliamentary legislation under that sub-clause. That is to say, the subject-matter of the Explanation is within the coverage of Article 286 (2), and that the two provisions are directly in conflict. It is difficult to see how consistently with this stand the appellant could resist the application of the maxim aforesaid. It is true that Bhagwati, J., who took that view in *The State of Bombay* v. *The United Motors (India) Ltd.*[1] has now retreated from that position. But with respect, there is irrefragable logic in his reasoning in that decision, and that commends itself to me.

Then, there is the third view that the sales to which the Explanation applies are in the course of inter-State trade, and therefore fall within the purview of Article 286 (2), and that in consequence, the power of the delivery State to tax those sales is incapable of exercise, as it is within the prohibition contained in that Article, and that when the Parliament enacts a law in terms of Article 286 (2) lifting the ban thereunder, then and not until then could the Explanation have any operation. That was the view expressed by Bose, J., in *The State of Bombay* v. *The United Motors (India) Ltd.*[1] and by Das, J., in *State of Travancore-Cochin* v. *Shanmugha Vilas Cashew Nut Factory*[2]. Briefly according to this view Article 286 (2) controls the Explanation. Can this be sustained on the language of the enactment? The Explanation is not expressed to be subject to Article 286 (2). Nor does the latter contain the words "notwithstanding anything contained in the Explanation to Article 286 (1) (*a*)". These are simple and familiar expressions used by the legislature when it intends that a particular provision in the Statute should be subject to or override another. Nor is there anything in the language of the Explanation providing that its operation is not to be *in praesenti* but contingent on Parliamentary legislation under Article 286 (2). To construe, therefore, Article 286 (2) as controlling the Explanation, we must import into the Statute words which are not there and thereby cut down the operation of the Explanation which on its terms is of equal authority and potency with Article 286 (2).

There being nothing express in the language of the enactment to lead to the conclusion that the Explanation is controlled by Article 286 (2), it has to be seen whether that conclusion can be drawn on a construction of the relevant provisions of the Statute. The appellant argues that it can be, and relies firstly on the saving clause in Article 286 (2), and secondly, on the proviso thereto as supporting it. The argument based on the saving clause may thus be stated: The contention that Article 286 (2) controls the Explanation would have resulted in rendering the latter wholly nugatory, if the words "except in so far as Parliament may by law otherwise provide" had not been there. But that result is avoided by the saving clause under which the Explanation can come into operation when there is Parliamentary legislation lifting the ban under Article 286 (2). This construction, it is argued, gives effect to the plain language of the Article and also to both the provisions. But when examined, it will be seen that far from giving effect to both the Explanation and Article 286 (2), this construction results in destroying one or the other of them. The harmonious construction which the law favours is one which gives operation to both the provisions at the same time but in their respective spheres. But according to the appel-

1. (1953) S.C.J. 373 : (1953) S.C.R. 1069: (1953) 1 M.L.J. 743 (S.C.).
2. 1954 S.C.R. 53 : (1953) S.C.J. 471 : (1953) 2 M.L.J. 123 (S.C.).

lant, if Article 286 (2) is in force then the Explanation cannot operate, and if the Explanation is to operate, it can only be if the Parliament puts an end to Article 286 (2) by legislation thereunder. This construction, far from reconciling the two provisions and giving operation to both of them, renders them uncompromisingly hostile, and makes their co-existence and co-operation impossible.

It is also open to question whether the saving clause could be referred to for the purposes of determining the respective spheres of operation of the Explanation and the body of Article 286 (2). The scope of a saving clause or an exception is that it operates within the area covered by the main provision on which it is engrafted. It cannot add to it though, when in force, it can detract from it. It would, therefore, be inadmissible for enlarging what would otherwise be the sphere in which Article 286 (2) would oprate. If the view that Article 286 (2) controls the Explanation cannot be maintained on a construction of the body of Article 286 (2) and the Explanation, it cannot properly be adopted on the strength of the saving clause annexed thereto.

There was considerable discussion before us as to the nature and scope of the law that could be enacted under Article 286 (2). It must be confessed that the matter is not free from doubts and difficulties. But about one thing, there can be no dispute. The law to be enacted by Parliament cannot run counter to any of the provisions of the Constitution. Thus, it cannot itself impose a tax on sales, that being within the exclusive jurisdiction of the States under Entry 54 in List II. Nor can it confer a power to tax a sale in the course of inter-State commerce on any State of its own choice in contravention of the Explanation to Article 286 (1) (*a*). Its operation can only be negative. It can lift the ban imposed by Article 286 (2). It was suggested for the appellant that it can do that as regards particular commodities or with reference to particular States, and that further in so limiting the operation it could enact suitable provisions for an equitable adjustment of the interests of all the States. But laws limited in their operation to specified commodities and States must in their very nature, be temporary legislation to be withdrawn and re-enacted from time to time suitable to the ever-changing conditions of inter-State trade and commerce. If that was the sort of legislation that the Constitution-makers had in mind, one would have expected that the authority contemplated by Article 307 would have been empowered to deal not merely with the matters mentioned in Articles 301 to 304 but also Article 286 (2), and it is also not a little surprising that no legislation should have been enacted on those lines during all these years. In any event, it must be a profitless task to speculate on the scope and effect of a hypothetical legislation under Article 286 (2), and it would be unsafe to base any conclusion as to the true scope of the Explanation on the existence of a power in the Parliament to enact a law under Article 286 (2).

The contention based on the proviso to Article 286 (2) must now be considered. It was argued that while the proviso is to have operation notwithstanding anything contained in Article 286 (2) it does not similarly override Article 286 (1) (*a*) and that therefore when the President issued an order under that proviso, the Explanation would have operation, and that therefore it was not useless. To this contention, there are two answers: (1) An order issued by the President under the proviso can operate only to continue existing taxes. It cannot go further, and authorise the imposition of a tax even when the conditions mentioned in the Explanation are satisfied, if, in fact, it had not been previously collected. Therefore, the Explanation can have no practical effect on the operation of the proviso. If, in fact, a delivery State had been levying a tax before the commencement of the Constitution, that would continue to be valid under the proviso, not by the operation of the Explanation but by reason of the fact that it had been levied before. Thus, the Explanation as such has

no operation. (2) It should also be mentioned that prior to the Constitution no State was actually levying a tax on the basis of delivery and therefore the Explanation could have no practical effect even when the President made the order. The Constitution-makers presumably had before them the sales tax legislation of all the States, and it is a legitimate inference that they could not have thought of the Explanation as deriving any force or operation by reason of an order of the President under the proviso.

Mr. Taikad Subrahmanya Iyer, counsel for M. K. Kuriakose, one of the interveners, arguing in support of the contention of the appellant that Article 286 (2) is the controlling provision, suggested a third category of cases wherein the Explanation could operate apart from a law under the saving clause in Article 286 (2) or the order of the President under the proviso thereto. His argument was this: Suppose that both the seller and the purchaser are in State 'A' and the goods are located in State 'B'. The instrument of sale is executed in State A, and pursuant thereto, the purchaser gets actual delivery of the goods in State B. Aricle 286 (2) has no application to the sale as there is no inter-State movement of goods thereunder. But for the Explanation, State A would have been entitled to tax the sale as it was inside that State. But the Explanation bars it, and confers on State B the right to tax it. This, it is contended, gives operation to the Explanation consistently with the view that it is controlled by Article 286 (2). The assumption underlying this argument is that the property in the goods passed in State A when the instrument of sale was executed, though the goods were then located in State B. But this is not correct. It is one thing to say that title to the goods passes at the time when the instrument of sale was executed and quite a different thing to state that it passes at the place where it is executed. Considering the matter with particular reference to the power of a State to impose tax, sale is a practical conception having relation to the right to enjoy and dispose of the goods, and it is a well-settled feature of all sales-tax legislation that the power to tax the sale is annexed to the place where the goods are located at the time of the contract. Under the general law also, the position is that title to the goods passes in the State in which the goods are situated at the time of the sale. In *Badische Anilin Und Soda Fabrik* v. *Hickson*,[1] there was a contract of sale signed by both the parties in England with reference to goods situated in Switzerland. The action was laid in England for breach of patent, and the point for decision was whether it was maintainable there. It would have been maintainable there if the sale was in England but not if it was in Switzerland. It was held by the House of Lords that the sale was not in England, and that the action did not lie. The position in law was thus stated by Lord Loreburn, L.C., at page 421:

> "As I understood him, Mr. Cripps argued that the defendant had 'vended' these goods in England within the terms of the patent. He admitted that merely to make a contract of sale would not be 'vending' or, to use a word in sense equivalent and in use more familar, selling. But he maintained that if the contract to sell was made in England, and, in pursuance of it goods were, by the consent of buyer and seller, appropriated to meet the contract, then the transaction became a sale completed in England, and that it did not signify whether the goods were at the time of such appropriation in England or abroad.
>
> I cannot accept that view. A contract to sell unascertained goods is not a complete sale, but a promise to sell. There must be added to it some act which completes the sale, such as delivery or the appropriation of specific goods to the contract by the assent, express or implied, of both buyer and seller. Such appropriation will convert the executory agreement into a complete sale".
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> * * * *
>
> In my opinion, if you must decide in what country an appropriation of goods by consent takes place, it takes place *not where the consent is given, but where the goods are at the time situate.*"

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1. L.R. 1906 A.C. 419.

these observations, it cannot be contended that the title to the goods State A and that State B gets the right to tax by reason of the Explanation State B gets the power to tax the sale not under the Explanation but the general law. This contention, it should be noted, has reference to s which *ex hypothesi* are outside Article 286 (2), and has only an indirect earing on the question whether Article 286 (2) controls the Explanation.

It is necessary now to refer to the arguments addressed by both parties based on what were stated to be the broad principles underlying the Constitution and on considerations of hardship or inconvenience arising from one view or the other. It was argued for the appellant that the intention of the Constitution-makers as disclosed in Ariele 301 was to encourage the free flow of trade and commerce within the Union unimpeded and unobstructed by State legislation, that Article 286 (2) was enacted in furtherance of that policy, as taxation by the States might become so heavy as to become burdensome to inter-State commerce; that the normal situation envisaged by that Article was, therefore. that no tax should be levied on sales in the course of inter-State trade, power being reserved in Parliament to intervene in appropriate cases and that consistently with this policy, Article 286 (2) should be construed as the controlling provision and the Explanation as an emergency reserve. The reply of the respondent was that the intention of the Constitution as expresed in Article 286 (1) (*a*) was to avoid multiple taxation of sales in the course of inter-State trade, and not to free them from any taxation, that the Constitution did contemplate the levy of one tax on every sale, and that the construction of the appellant, if accepted, must place local sales in a greatly disadvantageous situation as against sales in the course of inter-State trade, and that must result in driving out local trade and business across the borders of the State.

The appellant is undoubtedly right in his contention that the Constitution intended trade and commerce within the Union to be free. But the question is whether that requires that there should be no tax at all at any stage even when the goods have come to the end of their journey as a result of sale. That clearly is not the law in America where inter-State commerce is highly developed and jealously protected. That the Constitution did contemplate one tax on a sale in the course of inter-State trade when it is for local consumption is clear from the Explanation. To argue that freedom from taxation under Article 286 (2) is the normal condition, and that taxation under the Explanation is an exception is to beg the very question that we have got to decide. No other provisions of the Constitution have been cited as expressive of that intention. On the other hand, such indication as there is, tends in the opposite direction. Article 304 (*a*) which is an exception to Article 301 authorises the imposition of a tax on imported goods when similar goods locally manufactured are subject to a State tax provided that such imposition is not discriminatory. It is true, as contended by the learned Attorney-General, that under Article 304 (*a*) the tax is levied on the goods whereas under Article 286 (2) it is laid on the transaction of buying and selling. But on a question of policy, what difference would it make whether the tax is imposed on the transaction of sale or on the import of goods, as in either case it must fall on the consumers? That clearly is the reasoning of the majority of the learned Judges in *The State of Bombay* v. *The United Motors (India), Ltd.*,[1] and there has been no satisfactory answer to it by the appellant.

On the other hand, Article 304 (*a*) lends considerable support to the contention of the respondent that it could not have been the intention of the Con-

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1. 1953 S.C.R. 1069, 1088 : (1953) S.C.J.373 : (1953) 1 M.L.J. 743 (S.C.).

stitution to place local sales in a worse position than sales in the course of inter-State commerce, which must be the result of holding that sales in the course of inter-State trade are immune from taxation under Article 286 (2), while intra-State sales are liable to be taxed under Entry 54. What reason or justice can there be for making a local purchaser of goods pay a higher price therefor than what a purchaser of the same goods across the State line would have to pay? The only answer that was suggested was that the State might refrain from taxing even intra-State sales of those commodities which are the subject-matter of inter-State trade. Seeing that inter-State trade is happily an expanding factor in national life, and that it tends to comprehend an increasing variety of goods, there will be left, if the suggestion of the appellant is to be followed, very few commodities which the State could tax, and Entry 54 might as well be effaced from out of the Constitution. There is, besides, the apprehension expressed by the respondent—and it cannot be brushed aside as fanciful—that if the contention put forward by the appellant is accepted, then it must inevitably result in local trade shifting on to adjacent States. If the scheme of the Constitution is, as I conceive it to be, to put both intra-State sales and sales in the course of inter-State trade on the same footing—and that is manifest on the language of Article 301—it must follow that as the former are liable to be taxed under Entry 54, the latter should also be similarly liable to be taxed, and that is precisely what the Explanation provides for.

It was next argued for the appellant that the view that under the Explanation delivery States would be entitled to tax all sales in the course of inter-State trade if goods are delivered for consumption there, would render sellers liable to be taxed in all the States in which their goods are sold, and that would subject them to a perplexing multitude of assessment proceedings in several States and that that must cause great inconvenience and hardship in business circles. Our attention was also invited to the provisions of the impugned Act relating to assessment and collection of tax, and it was contended that they must result in considerable harassment of the assessees. As against this, the respondent contended that the sellers had really no grievance in the matter as the tax would be ultimately paid by the consumers, and that, on the other hand, if the contention of the appellant were to be accepted, the States would have to lose a substantial portion of the revenue derived from sales tax and that must seriously affect their economy.

It must be conceded that in the view that the Explanation authorises the imposition of tax on all sales in the course of inter-State trade falling within its purview, non-resident sellers will be liable to be taxed in every State in which the goods are sold for consumption, and that they must in consequence be exposed to multiple assessment proceedings in different jurisdictions and that that must cause inconvenience. But then, that is necessarily inherent in the Explanation whether it operates when the ban under Article 286 (2) is lifted by Parliamentary legislation as contended for by the appellant, or even without such law, as the respondent maintains. That does not, therefore, appear to be very material in construing the scope of the Explanation. The right which residents of one State have to trade freely in other States is one conferred by Article 301 and is a creature of the Constitution, and when the same Constitution provides for taxation of sales in the course of inter-State trade by the Explanation to Article 286 (1) (*a*), and the inconvenience complained of results from that provision and is incidental to its enforcement, it does not sound logical that the sellers should, while electing to take the benefit under Article 301, disclaim their obligations under the Explanation.

The point of substance against the appellant is that the sellers are not the persons really affected, as the incidence of taxation will ultimately fall on

The Explanation applies to goods delivered for consumption [in the] State, and the tax imposed on the sale of such goods is really a tax [on] the purchasers for consumption. It might happen that such purchasers [are] numerous and scattered all over the States, and that must be so when the goods sold are, as in the present case, medicines. The power to tax in such a case can be effectively exercised only through the seller. No administrative machinery can succeed in reaching the consumers when their name is legion, and as the seller is merely to pass on the tax to the consumer, he is, in fact, constituted collector of the tax on behalf of the State. This is the practice largely adopted in America in the collection of Use Tax, and its validity has been repeatedly affirmed. A recent decision on the question is that in *General Trading Co.* v. *State Tax Commission of the State of Iowa*.[1] There, the State of Iowa imposed a Use Tax on a foreign Company in respect of goods distributed by it for consumption within the State. In upholding the tax, Frankfurter, J., observed:

> "To make the distributor the tax collector for the State is a familiar and sanctioned device *Monamotor Oil Co.* v. *Johnson*[2], *Felt and T. Mfg. Co.* v. *Gallagher*[3]".

It was argued by the appellant that in the above case, the foreign Company was "a retailer maintaining a place of business" within the State. But as the tax in question was not a sale-tax but a use tax payable by the purchaser, it would be wholly irrelevant whether the distributor had a place of business within the State, and that indeed is what is stated in the judgment itself.

Even looking at the matter from the practical standpoint, it is easy to exaggerate the inconvenience which the Explanation might cause. If sellers have trade and commerce all over the States, theirs must undoubtedly be a big business. That means that they would have, for the purpose of the business, adequate clerical establishment—accountants, correspondence clerks and so forth. Regular account books would be maintained showing the dispatch of goods to dealers and purchasers in other States. And thus, all the materials on which returns have to be made would be already there. The additional burden will consist in this that in posting the entries in the ledger accounts, separate folios will have to be opened for the several States. This is no doubt additional work thrown on the sellers, but viewed in its true perspective, it is too unsubstantial to deny the States a substantive power to tax. It is said that there would be considerable harassment of the sellers under the provisions of the impugned Act. But why should there be? It must be presumed that sales-tax officers will do nothing unfair or oppressive, and the correspondence between the parties preceding the proceedings shows a just and sympathetic attitude on the part of the respondent. True, some of the provisions of the Act are of a stringent character. But they have terrors only for those who would evade and avoid tax, and persons like the appellant doing big business of an all-India character and maintaining regular and correct accounts have nothing to fear from them.

Now, let us look at the other side of the picture. Prior to the Constitution, the States had the power to tax even sales in the course of inter-State trade and commerce, and it is stated that a substantial portion of their revenue was derived from this source. The Constitution enacted Article 286 (1) (*a*) with

1. 332 U.S. 335: 88 L. Ed. 1309.
2. 292 U.S. 86: 78 L. Ed. 1141 at 1147, 1148.
3. 306 U.S. 62: 82 L. Ed. 488.

a view to avoid multiple taxation of sales in the course of inter-State trade, and it is the contention of the respondent that the Explanation on its true interpretation provides for a single taxation of those sales, at the stage of consumption. If the contention of the appellant as to the scope of the Explanation and of Article 286 (2) is accepted, this tax could not be levied after the 31st March 1951, and the States would have lost a substantial source of revenue. What is the substitute that the Constitution has provided therefor? None. In the result, there must be, as argued by the respondent, a financial crisis in the affairs of the States. The position, therefore, is that we have to choose between depriving the States of their power to impose a tax on which their very existence depends, and exposing the sellers having business outside their State to the inconvenience of multiple assessment proceedings. In that situation, can there be any doubt as to what our decision should be? Surely, the claim of the State should have precedence over that of individuals. It is very significant that all the States which have intervened have, with one exception, strongly supported the stand of the respondents. That exception is the State of West Bengal. The learned Attorney-General appearing for his State did not contend for any right in it to tax the sales. His argument was that neither West Bengal nor Bihar was entitled to tax by reason of Article 286 (2). The intervention of West Bengal is, therefore, not for protecting its rights but for the vindication of the law, as it conceives it to be.

It was suggested for the appellant that the solution to the problem lay in the Centre taking over the subject of tax on sales in the course of inter-State trade, provision being made for distribution of the receipts among the States under Article 269 after making the necessary amendments to the Constitution. Our duty is to construe the provisions as they stand and not to discuss questions of policy which it is for the Legislature to decide; and if I examine the suggestion of the appellant, it is only for the purpose of finding out what light it throws on the present controversy, and how far it will be an improvement on the present position under the Constitution. Under Entry 48 in List II of the Government of India Act, 1935, the States had the power to impose tax on sale of goods and advertisements. When dealing with this topic, the Constitution-makers took over advertisement of newspapers to the Union List, the residue being left to the States. Thus, the decision to entrust the power to tax sales to the States was deliberate, and there is good reason for it. Sales might take place either in the course of inter-State trade or be intra-State. There can be no question of the Centre taking over taxation of intra-State sales. To confer a power on the Centre to tax sales in the course of inter-State trade alone would be to dichotomise the power to impose sales tax and distribute it between the States and the Centre. For such a course, there does not appear to be any precedent, anywhere, and the practical inconvenience attendant thereon is obvious. Moreover, let us assume that the Centre takes over the taxation of sales in the course of inter-State trade. What difference will it make in the present position? So far as sellers are concerned, they will have to submit one consolidated statement of all the sales outside their State instead of splitting them according to the States in which the sales are effected, and there will be a single assessment proceeding instead of as many as the States where the sales take place. That would no doubt avoid much of inconvenience. But, so far as the burden of taxation on the sellers is concerned, the position would be exactly what it is now. And on what principle is the Centre to distribute the tax realisations among the States? It can only be on the basis of receipts from the several States. And there is justice in each State claiming what is realised from the consumers resident within its territory. That is precisely the scope of the consumption tax under the Explanation. Thus, the suggestion of the appellant, if acted upon, will not relieve it from the liability to be taxed; it will only reduce

the assessment proceedings from many to one. In other words, the relief will be with reference not to substantive rights, but to a matter of procedure. But the contention of the appellant that Article 286 (2) controls the Explanation is directed not against the procedure in the assessment of tax, but against the very liability to be assessed to it, the *argumentum ab inconvenienti* being availed of as a ground for denying it. The suggestion, therefore, that the taxation of sales in the course of inter-State trade should be left to the Centre lacks substance. Even with reference to the inconvenience that might result from the multiplicity of assessment proceedings, it is one which is capable of being removed without disturbing the existing scheme of the Constitution, by Parliament enacting a law constituting an authority under Article 307 and conferring on it power to receive from the sellers one consolidated statement of all their sales outside their State and determining the precise extent thereof effected in the several States and making that determination final for purposes of assessment by the States. That would, on the one hand, secure to the States the finance legitimately due to them under the Explanation, and at the same time, save the sellers from the harassment of multiplicity of proceedings. Such a law cannot be impugned as trespassing on the exclusive domain of the States to impose sales tax under Entry 54, as the authority to impose the tax would continue to be the States. It is the law of the several States that will determine the conditions under which, and the rate at which, the tax will be chargeable. It is the machinery set up by the States that will make the assessment and collect the taxes, and these realisations will find their way into the coffers of the States. The effect of the Act would be only to enact a rule of evidence, on which the assessing authorities have to act. Such a law would not conflict with any of the provisions of the Constitution. It is scarcely necessary to add that this suggestion is only by way of answer to the one put forward by the appellant, and even if there are Constitutional difficulties in the way of acting on it, that would not affect the decision of this appeal, which must turn on the provisions of the Constitution as they stand.

Having carefully considered the arguments addressed by the learned counsel appearing for the parties to the appeal and for the interveners, I am clearly of opinion that the sales falling within the Explanation are, by reason of the fiction enacted therein, intra-States sales, that accordingly they fall outside the ambit of Article 286 (2) and are unaffected by the prohibition contained therein. In coming to this conclusion, I have considered the question afresh and on its own merits as if it were *res integra*. But, in fact, it is concluded by the decision of this Court in *The State of Bombay* v. *The United Motors (India) Ltd.*[1] to which reference has been made in the course of the discussion. It is conceded that if this decision is to govern, then this point would have to be found against the appellant. But it is contended that it is erroneous and should not be followed. That raises the question whether this Court has the power to reconsider a previous judgment given by it on the identical issue. As the point arises for decision for the first time before this Court, and as our pronouncement thereon must be of the highest importance, we have heard arguments as to what the practice is in the highest judicial tribunals of other countries with reference to this matter.

In *Street Tramways* v. *London County Council*[2], it was held by the House of Lords that its decision on a question of law was conclusive and binding on the House in subsequent cases and that if it was erroneous, it could be set right

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1. 1953 S.C.R. 1069 : (1953) S.C.J. 373 : (1953) 1 M.L.J. 743 (S.C.).
2. L.R. (1898) A.C. 375.

only by an Act of Parliament. The practice before the Privy Council however has been different. In *Ridsale* v. *Clifton*[1], Lord Cairns dealing with this question observed as follows:

"In the case of decisions of final Courts of appeal on questions of law affecting civil rights, especially rights of property, there are strong reasons for holding the decisions, as a general rule, to be final as to third parties. The law as to rights of property in this country is to a great extent based upon and formed by such decisions. When once arrived at, these decisions become elements in the composition of the law, and the dealings of mankind are based upon a reliance on such decisions..

Even as to such decisions it would perhaps be difficult to say that they were, as to third parties, under all circumstances and in all cases absolutely final, but they certainly *ought not to be reopened without the very greatest hesitation*".

The case before the Board was one involving questions of ecclesiastical law, and it was held that in such cases their Lordships were free to examine for themselves the reason on which the prior decision rested and to decide on their own view of the matter. The authorities bearing on this question were reviewed by the Privy Council at some length in *Re: Transferred Civil Servants* (*Ireland*) *Compensation*[2], and the result was thus summed up:

"There is no inherent incompetency in ordering a rehearing of a case already decided by the Board, even when a question of a right of property is involved, but such an indulgence will be granted in very exceptional circumstances only. It is of the nature of an *extraordinarium remedium*".

This opinion was reiterated in *Attorney-General of Ontario* v. *Canada Temperance Federation*[3] wherein Viscount Simon said:

"Their Lordships do not doubt that in tendering humble advice to His Majesty they are not absolutely bound by previous decisions of the Board, as is the House of Lords by its own judgments In ecclesiastical appeals, for instance, on more than one occasion, the Board has tendered advice contrary to that given in a previous case, which further historical research has shown to have been wrong. But on constitutional questions it must be seldom indeed that the Board would depart from a previous decision which it may be assumed will have acted opun both by Governments and subjects".

Thus, the practice of the Privy Council has been to recognise a power to reconsider its previous decisions, but it is exercised only in exceptional circumstances. In *James* v. *Commonwealth*[4] the High Court of Australia has ruled that it has the power to examine the correctness of its previous decisions. The practice of the Supreme Court of America is that it has considered itself free to reconsider its previous decisions especially when they relate to questions of constitutional law. (*Vide* Willoughby on Constitutional Law, Vol. I, pages 74 and 75 and the cases cited there). The reason given for this view is that while errors of law not bearing on constitutional provisions could be corrected by ordinary process of legislation, an error on a question of constitutional law could be set right only by resort to the dilatory and cumbersome machinery of amending the Constitution: (Vide *Smith* v. *Allright*[5]). This reasoning will also be applicable to decisions involving interpretation of our Constitution. It was argued for the respondents that Article 141 gives the decisions of this Court the status of law, and that, therefore, if they are to be changed that could be only by process of legislation. Article 141 only enacts that the decisions of this Court are binding on all Courts, and that does not stand in the way of this Court itself, reversing or modifying a previous decision, as when that is done, such decision would thereafter become itself the law under that Article There is, therefore, good reason for holding that this Court has the power to reconsider, in appropriate cases, a previous decision given by it.

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1. (1877) 2 P.D. 276.
2. L.R. (1929) A.C. 242.
3. 1946 F.L.J. 50 : A.I.R. 1945 P.C. 88 (P.C.).
4. 18 C.L.R. 54.
5. 321 U.S. 659; 88 L. Ed. 987.

The question then arises as to the principles on which and the limits within which this power should be exercised. It is of course not possible to enumerate them exhaustively, nor is it even desirable that they should be crystallised into rigid and inflexible rules. But one principle stands out prominently above the rest, and that is that in general, there should be finality in the decisions of the highest Courts in the land, and that is for the benefit and protection of the public. In this connection, it is necessary to bear in mind that next to legislative enactments, it is decisions of Courts that form the most important source of law. It is on the faith of decisions that rights are acquired and obligations incurred, and States and subjects alike shape their course of action. It must greatly impair the value of the decisions of this Court, if the notion came to be entertained that there was nothing certain or final about them, which must be the consequence if the points decided therein came to be reconsidered on the merits every time they were raised. It should be noted that though the Privy Council has repeatedly declared that it has the power to reconsider its decisions, in fact, no instance has been quoted in which it did actually reverse its previous decision except in ecclesiastical cases. If that is the correct position, then the power to reconsider is one which should be exercised very sparingly and only in exceptional circumstances, such as when a material provision of law had been overlooked, or where a fundamental assumption on which the decision is based turns out to be mistaken. In the present case, it is not suggested that in deciding the question of law as they did in *The State of Bombay* v. *The United Motors (India) Ltd.*[1] the learned Judges ignored any material provisions of law, or were under any misapprehension as to a matter fundamental to the decision. The arguments for the appellant before us, were in fact only a repetition of the very contentions which were urged before the learned Judges and negatived by them. The question then resolves itself to this. Can we differ from a previous decision of this Court, because a view contrary to the one taken therein appears to be preferable? I would unhesitatingly answer it in the negative, not because the view previously taken must necessarily be infallible but because it is important in public interest that the law declared should be certain and final rather than that it should be declared in one sense or the other. That, I conceive, is the reason behind Article 141. There are questions of law on which it is not possible to avoid difference of opinion, and the present case is itself a signal example of it. The object of Article 141 is that the decisions of this Court on these questions should settle the controversy, and that they should be followed as law by all the Courts, and if they are allowed to be reopened because a different view appears to be the better one, then the very purpose with which Article 141 has been enacted will be defeated, and the prospect will have been opened of litigants subjecting our decisions to a continuous process of attack before successive Benches in the hope that with changes in the personnel of the Court which time must inevitably bring, a different view might find acceptance. I can imagine nothing more damaging to the prestige of this Court or to the value of its pronouncements. In *James* v. *Commonwealth*,[2] it was observed that a question settled by a previous decision should not be allowed to be reopened "upon a mere suggestion that some or all of the Members of the later Court might arrive at a different conclusion if the matter was *res integra*. Otherwise, there would be grave danger of want of continuity in the interpretation of the law". (per Griffiths, C.J. at page 58). It is for this reason that Article 141 invests decisions of this Court with special authority, but the weight of that authority can only be what we ourselves give to it.

It was suggested as a ground for reconsidering the correctness of the decision in *The State of Bombay* v. *The United Motors (India) Ltd.*[1] that it had

1. 1953 S.C.R. 1069 : (1953) S.C.J. 373 : (1953) 1 M.L.J. 743 (S.C.).
2. 18 C.L.R. 54.

caused great hardship to the business world. I have already held that there is not much of substance in this complaint. On the other hand, acting on the view that the Explanation confers on the delivery States power to tax the sales, several States amended their Sales Tax Acts in 1951 by inserting appropriate provisions and it is represented before us that for some years, taxes have been collected by the States on the basis of these provisions. If we are now to hold that the view taken in *The State of Bombay* v. *The United Motors (India) Ltd.*,[1] is erroneous, the consequences will be to render the amended provisions inoperative and the collections of taxes made thereunder illegal. The States will then be not merely powerless to tax sales falling within the Explanation in future, but will have actually to refund whatever they might have collected in the past. I can see no end to the chaos, confusion and trouble that must ensue on such a decision—a situation that can be retrieved only by Parliament removing Article 286 (2) out of the scene with retrospective operation, and all this, to benefit not the consumers who are the persons really affected but the sellers who are only statutory middlemen for collection, some of whom are stated to have collected sales tax from purchasers outside their States. I consider it wholly inexpedient that our power of reconsideration should be exercised for that end. This, of course, is apart from my conclusion that on a correct interpretation of the Explanation and Article 286 (2), the respondents have the power to tax. In the result, this point must be held against the appellant.

4. I shall now consider the question urged by the appellant that the Bihar Sales Tax Act is invalid on the ground that it is extra-territorial in operation and *ultra vires* the powers of the State Legislature. The Constitutional provisions bearing on this question are Articles 245 (1) and 246 (3) which are as follows:

"245. (1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

246. (3) Subject to clauses (1) and (2), the Legislature of any State specified in Part A or Part B of the First Schedule has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List")".

The contention of the appellant is that the words "for the whole or any part of the State" in Article 245 (1) and "for such State or any part thereof with respect to any of the matters enumerated in List II" in Article 246 (3) impose a territorial limitation on the jurisdiction of the State Legislature; that under these provisions it can enact laws only for persons and properties within the State and that the provisions of the Act to the extent that they impose tax on sellers who are outside the State are *ultra vires*. It was also contended that the impugned provisions were extra-territorial in their operation, and were beyond the competence of the State Legislature. The questions thus raised are of great importance involving the determination of the nature and extent of the power which a State has to make laws in respect of the matters enmerated in List II.

It is necessary, to begin with, to define the precise meaning of the words "extra-territorial operation". A sovereign State has plenary jurisdiction to enact laws for its own territory. Such laws may be in respect of persons within the territory whether citizens or not, of property, immovable or movable, situated within the State; or of acts and events which occur within its borders. In Maxwell on Interpretation of Statutes (10th Edn., p. 144) the law is thus stated:

"Primarily, the legislation of a country is territorial. The general rule is, that *extra territorium jus dicenti impune non paretur*. The laws of a nation apply to all its subjects and to all things and *acts* within its territories".

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1. 1953 S.C.R. 1069 : (1953) S.C.J. 373 : (1953) 1 M.L.J. 743 (S.C.).

In "Conflict of Laws—Restatement of the Law" by the American Law Institute, the position is thus summed up:

"47. A State has jurisdiction over a person :

(a) if he is within the territory of the State,

(b) if he is domiciled in the state although not present there,

(c) if he has consented or subjected himself to the exercise of jurisdiction over him either before or after the exercise of jurisdiction.

48. An immovable thing is subject to the jurisdiction of the State within which it is.

49. A chattel is subject to the jurisdiction of the state within which it is.

56. A state has jurisdiction over all *acts done or events occurring within the territory of the state*, and over all failures to act in cases where there is a legal duty to act within the state."

The legislation in respect of the above matters is intra-territorial, notwithstanding that it might operate on persons residing outside the State. Thus, a law of a State taking over the management of lands of absentee-landlords must operate on owners who are residing abroad. But in strictness, this is not extra-territorial legislation but legislation in respect of lands within the State. Likewise, a law with reference to acts or events which occur within the State is not extra-territoral, though it might have to be enforced against a person who is residing outside the State. Such a law is one in respect of an act or event within the State. These laws, though intra-territorial, are often loosely described as extra-territorial in operation. In this context the words "extra-territorial operation" connote laws in respect of properties or acts or events within a State but having impact or operation on persons outside the State.

There is another sense in which these words are used. When a State enacts a law with reference to an act or event which takes place outside its territory, it is described as extra-territorial, and such legislation is recognised as valid by rules of International Law where it is directed against its own nationals and persons in its service. Thus, in "Conflict of Laws—Restatement of Law" it is observed that "a nation has jurisdiction over its nationals although not present within the territorial limits of the nation." (page 78). In Corpus Juris Secundum, extra-territoriality is defined as "the act by which a State extends its jurisdiction beyond its own boundaries into the territory of another State", and it is added that "the almost self-evident proposition should perhaps also be noted in this connection that a sovereignty has power to make laws regulating the conduct of its subjects, while beyond the limits of its territorial jurisdiction." (Volume 15, pages 868-869). "Extra-territorial Legislation", says Wheare, "simply means legislation which attaches significance for courts within the jurisdiction to *facts and events occurring outside the jurisdiction*". (Statute of Westminster and Dominion Status by Wheare, 4th Edition, page 167). A typical illustration of this class of legislation is furnished by section 4, Indian Penal Code, which enacts that

"the provisions of this Code apply also to any offence committed by—

(1) any citizen of India in any place without and beyond India ;

(2) any person on any ship or aircraft registered in India wherever it may be.

Explanation : In this section the word 'offence' includes every act committed outside (India) which, if committed in (India) would be punishable under this Code.

Illustration : *A* (who is a citizen of India) commits a murder in Uganda. He can be tried and convicted of murder in any place in (India) in which he may be found".

In this connection, extra-territorial legislation means a law of a State with reference to its own citizens in respect of acts or events which take place outside the State. In discussing questions relating to extra-territorial operation, it is desirable that the two connotations of the words should be kept distinct and separate. As the impugned Act purports to tax sales within the territory, its

operation against persons who are residing outside but in respect of sales within the State is extra-territorial in the first sense, and it is the validity of the provisions of the Act in this sense that this appeal is concerned with.

Now, the question is, can a State Legislature make laws with extra-territorial operation in the sense stated above? The appellant contends that it cannot, and calls in aid observations and decisions of the Privy Council with reference to the powers of a subordinate or colonial legislature to enact laws with extra-territorial operation. In *Macleod* v. *Attorney-General for New South Wales,*[1] the point for decision was whether an Act of New South Wales conferred, on its true construction, jurisdiction on the Courts within the Colony to try an offence of bigamy committed presumably by its national in America. In construing it as intended to apply to crimes committed within the State, Lord Halsbury, L.C., observed that the jurisdiction of the colonies to enact laws was "confined within their own territories", and that "it would have been beyond the jurisdiction of the Colony" to enact a law in respect of a crime committed outside their territory. These observations refer to extra-territorial operation in the second sense stated above, and have no application when the law of the State is in respect of an act or event taking place within its territories. In *Commercial Cable Company* v. *Attorney-General of Newfoundland,*[2] the question was with reference to a law of Newfoundland imposing a tax on telephone companies in respect of cables landed or established in the Colony. In discussing the scope of these provisions, Lord Macnaghten observed at page 826:

> "While, of course, it was competent to impose taxation on cables within its territorial jurisdiction, it was not competent for the Government to lay a tax on cables outside its territorial jurisdiction ".

These observations again have no bearing on the point now under consideration whether a law enacted in respect of an act or event occurring within the State is incompetent, if it seeks to operate on a person concerned in the act but residing outside the State. In *Nadan* v. *The King,*[3] the question was as to the validity of section 1025 of the Criminal Code of the Dominion of Canada which enacted that "no appeal shall lie in criminal case to any authority in the United Kingdom by way of appeal or petition to His Majesty in Council". It was held by Viscount Cave, L.C., that that section was repugnant to the Privy Council Acts of 1833 and 1844, and was therefore void under the Colonial Laws Validity Act, 1865, and that accordingly the appeal to the Privy Council was competent. He also observed that however widely the powers of the Dominion Parliament be construed, they were confined to action to be taken in the Dominion, and could not extend to annulling the prerogative right of the King in Council to grant special leave to appeal. As the law in question was in respect of crimes committed within the State, these observations are capable of the construction which the appellant seems to put on them that such a law would be incompetent to the extent that it is to have operation outside the State. But it must be mentioned that the *vires* of the action to be taken under the Act within the State itself was affirmed in unqualified terms, and that is what we are concerned with in this appeal. The question, however, must now be taken to be settled by the decision in *Croft* v. *Sylvester Dunphy.*[4] There, the question related to the validity of sections 151 and 207 of the Customs Act of Canada under which the officers of the State were authorised to search ships within 12 miles of the coast, and seize dutiable goods found in them, the provisions being obviously intended to aid in the effective collection of customs. There was no dispute that the legislation was within the competence of the Dominion Legislature, customs being one of the topics enumerated in section 91 of the British North America Act, 1867, but the attack was on the validity of sections 151 and 207 on the ground that their operation was extra-territorial. Thus, the question

1. L.R. (1891) A.C. 455.
2. L.R. (1912) A.C. 820.
3. L.R. (1926) A.C. 482.
4. L.R. (1933) A.C. 156.

raised is the very question which now arises for determination. In holding that the legislation was valid, Lord Macmillan observed as follows:

"Once it is found that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate as being for the peace, order and good government of Canada or as being one of the specific subjects enumerated in section 91, British North America Act, their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully sovereign State".

The law as settled by this decision may thus be stated: Whether a subordinate Legislature has power to enact laws with extra-territoral operation will depend on the terms of the Constitution Act which creates it and subject to any limitations contained therein, it has in respect of the topics assigned to it powers of legislation as plenary as the sovereign Legislature which constitutes it.

It was argued by Mr. N. C. Chatterjee that subsequent to the decision in *Croft* v. *Dunphy*,[1] the Privy Council had again to consider in *British Coal Corporation* v. *The King*,[2] the validity of a Canadian law which had extra-territorial operation, and therein the grounds of the decision in *Nadan* v. *The King*,[3] were stated at page 516 with apparent approval, and that though the legislation was held to be valid, it was because of the Statute of Westminster, 1931, and that in the absence of a similar statute for India, the Legislature of this country had only the limited powers recignised in *Nadan* v. *The King*,[3] and that extra-territorial legislation was incompetent. But there is nothing in the observations in *British Coal Corporation* v. *The King*,[2] relied on by the appellant, to support the contention that the view expressed in *Nadan's case*,[3] was adopted in preference to that taken in *Croft* v. *Dunphy*[1]; in fact, there was no decision at all on this point. Nor does the fact that the Statute of Westminster has conferred an express power on the Colonial Legislature to enact laws with extra-territorial operation affect the weight to be attached to the conclusions come to in *Croft* v. *Dunphy*[1], because they were reached, not with reference to the Statute of Westminster about the applicability of which retrospectively to the case before the Board there was controversy, but on general principles, and what is more to the present case, it was the law as declared in *Croft* v. *Dunphy*[1] that was before the framers of the Constitution when they enacted sections 99 and 100 of the Government of India Act, 1935.

Turning now to the constitutional provisions under the Indian law, this topic is dealt with in sections 99 (1) and 100 (3) of the Government of India Act. To understand the precise scope of these provisions, it is necessary to examine the position under the previous Constitution Acts. Section 43 of the Charter Act, 1833 (3 and 4 Will, IV, Chap. 85) conferred the power on the Governor-General in Council "to make laws and regulations for all persons ....and for all Courts and for all places and things whatsoever *within and throughout the whole and every part of the said territory*". In the Government of India Act, 1915 (5 and 6 Geo. V, Ch. 61) the corresponding provision was section 65 (1) (*a*) which enacted that the Indian Legislatures have the "power to make laws for all persons, for all Courts and for all places and things within the British India". Under these provisions, it cannot be doubted that the Indian Legislatures would have had no jurisdiction to enact laws operating on persons who were not within the State, as that would be plainly opposed to the limitation that they should be "for persons within the territory". Both section 43 of the Charter Act, 1833 and section 65 (1) (*a*) of the Government of India Act, 1915, are based on the theory which was then widely held that a subordinate Legislature had no competence to enact laws

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1. L.R. (1933) A.C. 156.
2. L.R. (1935) A.C. 500, 516.
3. L.R. (1926) A.C. 482.

with extra-territorial operation. Then came the Government of India Act, 1935. Sections 99 (1) and 100 (3) which are relevant provisions are as follows:

"99. (1) Subject to the provisions of this Act, the Federal Legislature may make laws for the whole or any part of British India or for any Federated State, and a Provincial Legislature may make laws for the Province or for any part thereof.

100. (3) Subject to the two preceding sub-sections, the Provincial Legislature has, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II in the said Schedule (hereinafter called the 'Provincial Legislative List)'".

The language of these sections marks, it will be noticed, a wide departure from that of section 43 of the Charter Act and section 65 (1) (*a*) of the Government of India Act, 1915. The limitation that the legislation should be for persons or things within the territory has been removed. Instead, it is enacted that it could be "for the whole or part of British India in the case of Federal Legislature" and "for the Province or part thereof in the case of Provincial Legislature", and under section 100 (3), the power is to make laws for a Province or a part thereof with respect to the matters enumerated in List II. Under sections 99 (1) and 100, the legislative power of the Centre or the Province is determined by two conditions. It must be for the territory specified, and it must be in respect of the topics enumerated in the respective lists. If these conditions are satisfied, then the law is valid notwithstanding that it may have impact or operation outside the State. The scope of the legislative power conferred by sections 99 (1) and 100 is precisely the same as that conferred on the Legislatures of Canada under sections 91 and 92 of the British North America Act. That was also a power conferred on the Dominion Parliament or the Provincial Legislature to make laws for the Dominion or the Province in respect of the matters mentioned in sections 91 and 92 respectively. It is on the construction of these provisions that Lord Macmillan held in *Croft* v. *Dunphy*[1] that the Dominion Legislature was competent to enact laws in respect of those matters even if they had extra-territorial operation. The framers of the Government of India Act, 1935, changed the language of section 65 (1) (*a*) *of* the Government of India Act, 1915, and substituted words similar to those in sections 91 and 92 of the British North America Act, 1867. It is a reasonable deduction to make that they intended to give effect to the law as declared in *Croft* v. *Dunphy*[1]. A law which satisfies the two conditions prescribed in sections 99 (1) and 100, therefore, must be held to be *intra vires*, even though it might have extra-territorial operation.

The precise extent of the powers conferred by sections 99 (1) and 100 has also been the subject of considerable judicial consideration. In *Governor-General in Council* v. *Raleigh Investment Co. Ltd.*[2], the question was as to the liability of a Company which was incorporated under the English Companies Act having its main office in England and no place of business in India to be assessed to income-tax under the provisions of the Indian Income-tax Act. The Company held the bulk of shares in nine Companies which were also registered in England and controlled from there, and carried on business in British India and earned profits. Dividends in respect of these profits were declared in London and paid to the assessee in London. The Explanation to section 4 (*i*) (*c*) of the Indian Income-tax Act enacts that a dividend paid outside British India shall be deemed to be income accruing in or arising in British India to the extent to which it has been paid out of profits subjected to tax in British India. The income-tax authorities claimed that the dividends received by the assessee Com-

1. L.R. (1933) A.C. 156.
2. (1944) F.C.R. 229 : (1944) F.L.J. 131 : (1944) 1 M.L.J. 477 (F.C.).

party were liable to be taxed under this provision. The Company resisted the claim *inter alia* on the ground that as it was not resident in British India and did not carry on business there, the Indian Legislature had no competence to impose a tax on it, and that the provisions of the Act were *ultra vires* as extra-territorial in their operation. This contention succeeded before the High Court of Calcutta, the Chief Justice observing that the impugned provision amounted to the 'Legislature of British India without specific or apparent authority stretching out its legislative arm and physical hand beyond British India into other countries in an attempt to tax persons and property there not subject to its laws'; and Mitter, J., characterising it as a 'piece of extra-territorial legislation not by a superior or Dominion Legislature but by a subordinate Legislature'. On appeal, this decision was reversed by the Federal Court. Spens, C.J., who delivered the judgment of the Court held firstly that as the source of the income which was subjected to tax was Indian, it was competent for the Indian Legislature to impose a tax thereon, and *no question of extra-territorial operation arose*. That is to say, Entry 54 in List I gave power to the Indian Legislature to tax income which arises from British India, even though the person to be taxed was not resident within British India. He also held that even if an element of extra-territoriality was involved, the legislation was not bad on that account, because section 99 (1) and section 100 of the Government of India Act, 1935, were intended to embody the law as declared in *Croft* v. *Dunphy*[1] and to confer on the Indian Legislature plenary powers of legislation in respect of matters mentioned in the lists, departing in this respect from the position under section 65 (1) (*a*) of the Government of India Act, 1915.

In *Wallace Brothers & Co. Ltd.* v. *Commissioner of Income-tax, Bombay*[2], the appellant was a Company registered in England and controlled from there. It held a 14|32 share in a firm called Messrs. Wallace & Co., which was carrying on business in Bombay. The appellant was sought to be taxed not merely on its income as partner of the Bombay firm about which there was no dispute but also on the income of over seven lakhs of rupees which had arisen and had accrued to it abroad. The appellant resisted the claim on the ground that the provisions of the Indian Act were *ultra vires* as their operation was extra-territorial, inasmuch as they sought to tax income of a non-resident received abroad. The Federal Court rejected this contention. It held that if the person proposed to be taxed had sufficient business connection with British India, that would confer a jurisdiction on the Indian Legislature to tax him, and that what heads of income in his hands should be taxed was a matter of policy which was within the province of the Legislature to decide. It also held that the provisions of the Act were "not in their operation extra-territorial in the strict legal sense." There was an appeal against this judgment to the Privy Council, *i.e.* *Wallace Bros.* v. *I. T. Commissioner, Bombay*[3]. Affirming the judgment of the Federal Court, Lord Uthwatt observed that the fact that the appellant "was a member of the partnership carrying on business in British India" was irrelevant in considering whether the legislation was *intra vires*; that it was to be assumed that there was "no connection between the Companies and British India except the derivation from British India of the larger part of their income", and that the validity of the legislation should be determined on that basis. He then observed:

"There is no rule of law that the territorial limits of subordinate legislature define the possible scope of its legislative enactments or mark the field open to its vision. The ambit of the powers possessed by a subordinate legislature depends upon the proper construction of the statute conferring those powers. No doubt the enabling statute has to be read against the background that only a defined

1. L.R. (1933) A.C. 156.
2. (1945) F.C.R. 65: (1945) F.L.J. 34: (1945) 1 M.L.J. 359 (F.C.).
3. (1948) F.C.R. 1: L.R. 75 I.A. 86: (1948) 2 M.L.J. 62 (P.C.)

territory has been committed to the charge of the legislature. Concern by a subordinate Legislature with affairs or persons outside its own territory may therefore suggest a query whether the Legislature is in truth minding its own business. It does not compel the conclusion that it is not. The enabling statute has to be fairly construed ".

He then referred to section 99 (1) and section 100 of the Government of India Act under which the Indian Legislature had power to enact laws for the whole or part of British India with respect to tax on incomes, and concluded:

> " The resulting general conception as to the scope of income-tax is that given a sufficient territorial connection between the person sought to be charged and the country seeking to tax him income-tax may properly extend to that person in respect of his foreign income. . . . . The principle —sufficient territorial connection—not the rule giving effect to that principle—residence—is implicit in the power conferred by the Government of India Act, 1935. The result is that the validity of the legislation in question depends on the sufficiency for the purpose for which it is used of the territorial connection set forth in the impugned portion of the statutory test ".

It is the contention of the respondent that the present question is concluded by this decision. In *A. H. Wadia* v. *I. T. Commissioner, Bombay*,[1] the question related to the liability of the Gwalior Durbar to be assessed to income-tax in respect of interest received at Gwalior. There was a Company called the Providence Investment Co., Ltd., carrying on business in Bombay. The shares of the Company were all held by the Durbar or by its nominees. It was financed by the Durbar, the transaction taking the form of loan advanced at Gwalior. On these facts, the Income-tax Officer assessed the Agent of the Durbar to tax on the interest received at Gwalior. The validity of this assessment was disputed on the ground that the statutory provisions under which it was made were extra-territorial in their operation and therefore *ultra vires*. It was held by all the learned Judges following the decisions in *Governor-General in Council* v. *Releigh Investment Co. Ltd.*,[2] and *Wallace Bros.* v. *I. T. Commissioner, Bombay*,[3] that the assessee would be liable to tax if there was sufficient business connection between him and British India, and that, in that event, the provisions would not be bad on the ground of extra-territorial operation. There was, however, a difference of opinion among the learned Judges as to whether, on the facts, sufficient territorial connection had been established, the majority holding that it had been, while two learned Judges thought otherwise. That, however, is not material to the present discussion.

These authorities establish that under section 99 (1) and section 100 of the Government of India Act, a law enacted by the Indian Legislature in respect of the matters enumerated in the appropriate lists would be valid provided it is for the territory entrusted to their charge; that whether it was so or not would depend on whether there was sufficient territorial connection between the person who is sought to be charged or proceeded against under the law and the country which enacts the law; and that when such connection exists, the law is not strictly speaking extra-territorial, and it is not *ultra vires* on the ground that the person is not residnig within the State which enacts the law.

Then, we come to the Constitution. Articles 245 (1) and 246 which deal with this subject reproduce sections 99 (1) and 100 with only alterations of a formal character. They confer on the Parliament and the State Legislatures power to enact laws in respect of the topics mentioned in the respective lists to be exercised for the territory over which they have jurisdiction. It is a well-settled rule of construction that when a statute is repealed and re-enacted and words in the repealed statute are reproduced in the new statute, they should be interpreted in the sense which had been judicially put on them under the re-

1. (1948) F.C.R. 121 : (1949) F.L.J. 18 : (1949) 1 M.L.J. 335 (F.C.).
2. (1944) F.C.R. 229 : (1944) F.L.J. 131 : (1944) 1 M.L.J. 477 (F.C.).
3. (1948) F.C.R. 1 : L.R. 785 I.A. 86 : (1948) 2 M.L.J. 62 (P.C.).

pealed Act, because the Legislature is presumed to be acquainted with the construction which the Courts have put upon the words, and when they repeat the same words, they must be taken to have accepted the interpretation put on them by the Court as correctly reflecting the legislative mind. On a construction of Articles 245 (1) and 246, therefore, it will be difficult to come to any other conclusion than that a sales tax legislation of a State which is otherwise valid is not *ultra vires* on the ground that the person proposed to be taxed is not resident within the territorial limits of the State.

Three other contentions urged in opposition to this conclusion must now be considered:

1. It is only the Central or Federal Legislature that has the power to enact laws with extra-territorial operation, and that the Legislatures of the States forming units of a Federal Union do not possess such power.

2. Under Article 245 (2) there is a prohibition against States enacting laws with extra-territorial operation.

3. Some of the provisions of the Act forming the machinery sections for the assessment and collection of taxes are, in any event, unauthorised and the whole Act is void on the ground that the valid provisions thereof cannot be separated from the invalid ones.

On the first question, it is argued by the learned Attorney-General that the decision in *Croft* v. *Dunphy*[1] had reference to a law enacted by the Legislature of Dominion of Canada and not any of the Provinces, and that the decisions in *Governor-General in Council* v. *Releigh Investment Co.*,[2], *Wallace Brothers & Co.* v. *The Commissioner of Income-tax, Bombay*[3] and *A. H. Wadia* v. *Income-tax Commissioner, Bombay*,[4] related to the Indian Income-tax Act which was enacted by the Central Legislature, and that to apply the doctrine laid down in those cases to laws passed by the States would be to extend its operation beyond recognised limits, and that there was no warrant for it in the Constitution. On principle, it is difficult to see why a law enacted by the State in respect of the matters assigned exclusively to its jurisdiction should stand on a different footing from a law passed by Parliament on a matter within its jurisdiction. Both the Legislatures derive their authority from the same source, whether it be the Government of India Act, 1935, or the Constitution of India. Under these Statutes, the State is not subordinate to the Centre, its authority being supreme in respect of the matters entrusted to it. Under the Government of India Act, 1935, when the British Government decided to change what was a unitary into a Federal Government, the process adopted for that purpose was that the Parliament resumed all the powers that had been granted under the previous Constitution Act and redistributed them between the Centre and the Province. The terms on which the redistribution was made were identical both for the Centre and the Province, their authority under sections 99 (1) and 100 being to enact laws in respect of the matters mentioned in the appropriate lists and for their respective territory. The extent of this authority must, therefore, be the same both in the case of the Centre and the State, each being sovereign within its own sphere. The principle laid down in *Croft* v. *Dunphy*,[1] that a subordinate Legislature has plenary powers in respect of the topics assigned to it will apply as much to the State with reference to the matters enumerated in List II as to the Centre with reference to the topics mentioned in Lists I and III. In *Hodge* v. *The Queen*[5] which is one of the cases on which the decision in *Croft* v. *Dunphy*[1] was based, the law under challenge was that of the Province of Ontario in Canada in respect of a topic enumerated in section 92 of the

1. L.R. (1933) A.C. 156.
2. (1944) F.C.R. 229 : (1944) F.L.J. 131 : (1944) 1 M.L.J. 477 (F.C.).
3. (1948) F.C.R. 1 : L.R. 75 I.A. 86 : (1948) 2 M.L.J. 62 (P.C.).
4. (1948) F.C.R. 121 : (1949) F.L.J. 19 : (1949) 1 M.L.J. 335 (F.C.).
5. L.R. (1883) 9 A.C. 1171.

British North America Act of 1867. The question whether States as distinct from the Commonwealth have competence to enact laws with extra-territorial operation has also been considered in some of the decisions of the Australian High Court. In *Broken Hill South, Limited* v. *The Commissioner of Taxation*[1], Evatt, J., in discussing this question observed as follows at page 378:

"Some of the cases also illustrate the fact, occasionally overlooked, that, constitutionally speaking, the status of the States of Australia is equal to, or co-ordinate with, that of the Commonwealth itself. Sovereignty is not attributable to one authority more than to the others; it is divided between them in accordance with the demarcation of functions set out in the Commonwealth Constitution. Within the limits so prescribed, the legislative authority of the States is of precisely equivalent quality and potency to that of the Commonwealth, the authority of which is, in sections 51 and 52 of the Commonwealth Constitution, limited by reference to subject-matter. In short, the Commonwealth Parliament may legislate for 'the peace, order and good government of the Commonwealth with respect to' a large number of subject-matters. Similarly, the State of New South Wales may legislate for the 'peace, welfare and good government' of New South Wales. In relation to such a subject-matter as that of taxation, and subject, of course, to any overriding provision of the Commonwealth Constitution, it is quite impossible to deny to the States in relation to their geographical area constitutional powers precisely analogous to those possessed by the Commonwealth Parliament in relation to its geographical area. The legislation of the States cannot be deemed *ultra vires* merely because of territorial reasons, unless analogous legislation of the Commonwealth Parliament would similarly be deemed unconstitutional and void".

These observations are very apposite to the present controversy. The conclusion is inescapable that the powers of the Union and the State under sections 99 (1) and 100 of the Government of India Act, as also under Articles 245 (1) and 246 in respect of the matters mentioned in their respective lists have the same content and quality, and that if legislation with extra-territorial operation is within the competence of the Union, it is equally within the competence of the State.

Coming now to the second contention, the argument of the appellant is that in enacting that "no law of Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation", Article 245 (2) prohibits by implication the enactment of such laws by the States. This contention is unsound. The words "extra-territorial operation" are used, as already stated, in two different senses as connoting firstly, laws in respect of acts or events which take place inside the State but have operation outside, and secondly, laws with reference to the nationals of a State in respect of their acts outside; that in its former sense the laws are strictly speaking intra-territorial though loosely termed 'extra-territorial', and that under Article 245 (1) it is within the competence of the Parliament and of the State Legislatures to enact laws with extra-territorial operation in that sense. The words "laws with extra-territorial operation" in Article 245 (2) must be understood in their second and strict sense as having reference to the laws of a State for their nationals in respect of acts done outside the State. Otherwise, the provision would be redundant as regards legislation by Parliament and inconsistent as regards laws enacted by States. This conclusion is placed beyond doubt when regard is had to the history of legislation on this topic. Section 43 of the Charter Act, 1833, while restricting the scope of legislative authority to persons and things within the State thus denying the power to enact laws with extra-territorial operations in the first sense, conferred a power to make laws "for all servants of the Company within the Dominion of Princes and States in alliance with the said Company". This was a power to enact extra-territorial legislation in the second sense

1. 56 C.L.R. 337.

for servants of the Company. Section 65 (1) of the Government of India Act, 1915, followed the same pattern, and while limiting under sub-clause (*a*) the power of Indian Legislatures to enact laws for persons and things within British India conferred jurisdiction to enact laws with extra-territorial operation in the second sense by sub-clauses (*b*), (*c*), (*d*) and (*e*) which are as follows:

"65. (1) The (Indian Legislature) has power to make laws—

(*b*) for all subjects of His Majesty and servants of the Crown within other parts of India ; and

(*c*) for all native Indian subjects of His Majesty, without and beyond as well as within British India ; and

(*d*) for the government of officers, soliders, (airmen) and followers in His Majesty's Indian forces, wherever they are serving, in so far as they are not subject to the Army Act (or the Air Force Act) ; and

(*e*) for all persons employed or serving in or belonging to the Royal Indian Marine Service".

This topic was again dealt with in section 99 (2) of the Government of India Act, 1935, which runs as follows:

"99. (2) Without prejudice to the generality of the powers conferred, by the preceding sub-section, no Federal law shall, on the ground that it would have extra-territorial operation, be deemed to be invalid in so far as it applies—

(*a*) to British subjects and servants of the Crown in any part of India ; or

(*b*) to British subjects who are domiciled in any part of India wherever they may be ; or

(*c*) to, or to persons on, ships or aircraft registered in British India or any Federated States wherever they may be ; or

(*d*) in the case of a law with respect to a matter accepted in the Instrument of Accession of a Federated State as a matter with respect to which the Federal Legislature may make laws for that State, to subjects of that State wherever they may be ; or

(*e*) in the case of law for the regulation or discipline of any naval, military, or air force raised in British India, to members of, and persons attached to, employed with or following, that force, wherever they may be".

In *Governor-General* v. *Raleigh Investment Co.*[1] the question was raised whether these provisions were restrictive of the power of the Indian Legislature to enact laws with extra-territorial operation in respect of matters other than those enumerated in section 99 (2). Spens, C.J., held that as the impugned provisions were within the ambit of legislative power under sections 99 (1) and 100 of the Government of India Act, 1935, they were not extra-territorial in operation and that even if they were, the words "without prejudice to the generality of the powers conferred by the preceding sub-section" occurring in section 99 (2) posited the existence of a power *aliunde*, and that the enumeration of the specified topics in that sub-clause was by way of abundant caution. On the 14th August, 1947, acting under section 9 of the Indian Independence Act the Governor-General issued an Adaptation Order, and therein, for the words "for the whole or any part of British India or for any Federated State" were substituted the words "including laws having extra-territorial operation for the whole or any part of the Dominion"; and sub-section (2) was omitted. When the Constitution was enacted, the words "including laws having extra-territorial operation for the whole or any part of the Dominion" were omitted, and in their place, Article 245 (2) was enacted. Thus, Article 245 (2) is a successor to section 65 (1), sub-clauses (*b*), (*c*), (*d*) and (*e*) of the Government of India Act, 1915, and section 99 (2) of the Government of India Act, 1935, and its scope is extra-territorial legislation in the second sense. As we are concerned in this appeal with extra-territorial operation in its first sense, Article 245 (2) has no application,

1. (1944) F.C.R. 229 : (1944) F.L.J. 131 : (1944) 1 M.L.J. 477 (F.C.).

and the attack on the impugned Act on the ground that it is barred by Article 245 (2) must fail.

The third contention has reference to the machinery sections of the Act relating to the assessment and collection of taxes. The argument was that even if the Bihar Legislature had the competence to enact under Entry 54 a taxation law against non-residents, it had no power to enforce it outside its own territorial limits, and some of the provisions were bad on this ground, such as section 17 which authorised search of premises and seizure of accounts, and section 26 which made it an offence to obstruct such search or seizure. But we are not called upon in these proceedings to pronounce on the validity of these provisions. The respondent issued notice under section 13 (5) of the Act calling upon the appellant to send his returns and proposing in case of default to make assessment on the basis of best judgment. It was at this stage that the appellant rushed to the Court, and moved for a writ of prohibition to restrain the proceedings on the ground of want of jurisdiction. That is the one and the only question that now falls to be determined. Even if some of the machinery sections are bad—it is a question to be decided when it arises whether they can be justified on the ground that they are ancillary or incidental to the substantive provisions, as to which see *Attorney-General for Canada* v. *Cain*[1] and *Croft* v. *Dunphy*[2]—that would not affect the power of the State to impose tax, and it will therefore be foreign to the scope of this appeal to enter into a discussion of their validity.

It was urged by the learned Attorney-General that if the machinery sections were bad on the ground that they were extra-territorial in their operation, and if the power to tax was so mixed up with them as to be inseparable from them, then, when they fall it must also fall. A power to tax is a matter of substantive law, whereas the machinery sections providing for the execution of that power such as, assessment, and collection of tax, pertain to the domain of adjectival law, and the two are distinct and separable. It is elementary law that the power to tax does not depend on the ability to realise it. In *British Columbia Electric Railway Co., Ltd.* v. *The King*,[3] Viscount Simon observed:

> "A Legislature which passes a law having extra-territorial operation may find that what it has enacted cannot be directly enforced, but the Act is not invalid on that account, and the Courts of its country must enforce the law with the machinery available to them".

Without expressing any opinion, therefore, on the validity of the machinery sections, I must hold that the impugned Act in so far as it authorises the imposition of tax on sales falling within the Explanation to Article 286 (1) (*a*) is neither *ultra vires* the powers of the State Legislature nor bad on the ground that it is extra-territorial in its operation.

5. Then there remains the contention of the appellant that even assuming that the States could, under the Explanation, enact a law imposing a tax on a non-resident and that such law would not be hit by Article 286 (2), the impugned Act must even then be held to be bad for the reason that it was not authorised by the terms of the Explanation. Two grounds were urged in support of this contention: (1) that under the Explanation truly construed, a seller could be taxed only if he is within the State, and (2) that the goods were actually delivered not in Bihar but in Bengal and that therefore the Explanation did not apply. The argument in support of the first ground was that as the Explanation enacts that the sale or purchase—not merely the sale—must be deemed to have taken place in the delivery State, it must be construed in the light of the presumption that the laws of a State are intended to operate on

1. L.R. (1906) A.C. 542.
2. L.R. (1933) A.C. 156.
3. L.R. (1946) A.C. 527.

persons or things within its territory, and so construed, it should be held to authorise the levy of a tax on the seller only if he was within the State or on the purchaser who must be within the territory. The assumption on which this argument rests is that States have jurisdiction only over persons and property within their territory; but this, as already shown, is not correct. A State has jurisdiction to enact laws in respect of acts and events which occur within its territory, and if a sale takes place within the State as under the Explanation it does by a legal fiction, then its jurisdiction to enact a law imposing a tax thereon is complete, and no question of its overstepping its territorial limits arises. It should also be noted that the scope of the presumption that the laws of a State are not intended to operate outside its territory is, as stated by Maxwell, that "Parliament does not design its Statutes to operate on its subjects beyond the territorial limits of the United Kingdom" (Maxwell's Interpretation of Statutes, 10th Edn., page 145). That has reference to extra-territorial operation in the second sense. There is no presumption that the laws of a State made with reference to acts and events occurring within its borders are not intended to have operation outside its territory.

Moreover, a tax on sale of goods is, as observed in *The Province of Madras* v. *Messrs. Boddu Paidanna & Sons*[1] "a tax levied on the occasion of the sale of goods" and the liability to tax arises "on the occasion of a sale". In *The State of Bombay* v. *The United Motors (India) Ltd.*[2], it was stated that the sales-tax was a tax imposed "on the occasion of the sale as a taxable event". It is thus, in essence, a tax levied on the act of buying and selling. Sale is the result of a contract, and is bilateral in character. There can be seller only in relation to a purchaser and *vice versa*. It therefore follows that the power to impose a tax on sale imports a power to tax either the seller or the purchaser.

In *V. M. Syed Mohammad & Co.* v. *The State of Andhra*[3], the question was raised for decision whether Entry 48 in the Provincial List of the Government of India Act, 1935 "tax on sale of goods" included a power ti impose a tax on the purchaser. It was held that it did, and it was observed that when Entry 54 in List II of the Seventh Schedule of the Constitution substituted for the words "tax on sales" occurring in Entry 48 the words "tax on sale or purchase", it did not thereby enlarge the powers previously conferred by Entry 48 but "merely expressed in clearer language what was implicit in that corresponding entry". When Article 286 (1) (*a*) and the Explanation refer to a sale or purchase, they merely conform to the terms of Entry 54, and these words cannot therefore be construed as splitting up the power to tax sales into two parts, one available against the purchaser at all times, as in the very nature of it he must be within the State, and the other against a seller if he is within jurisdiction. The power is one and indivisible to be exercised when the conditions mentioned in the Explanation are satisfied against either a seller or buyer as the Legislature might determine.

The language of the Explanation, it should be marked, does not impose any limitation or condition on the exercise of this power. It is general and unqualified, and will comprehend all cases in which goods are delivered for consumption in the taxing State irrespective of whether the seller is within the State or not. To hold that the tax could be imposed on a seller only if he is within the State would be to add words to the Explanation which are not there, and for this, there is no jurisdiction. On the other hand, there are good reasons why the power should have been vested in the Legislature to determine whether it will tax the seller or the buyer. The tax imposed under the Explanation really

1. (1942) F.L.J. 61 : A.I.R. 1942 F.C. 33 : (1942) 2 M.L.J. 327 (F.C.).
2. 1953 S.C.R. 1069 : (1953) S.C.J. 373 : (1953) 1 M.L.J. 743 (S.C.).
3. 1954 S.C.R. 1117 : (1954) S.C.J. 390 : (1954) 1 M.L.J. 619 (S.C.).

falls on the consumer-purchaser. While it is possible that with reference to certain classes of goods the tax can effectively be imposed on the purchaser, it must happen that with reference to the other kinds of goods as, for example, medicines in the present appeal, it cannot be so done, and, as already pointed out, it is a "familiar and sanctioned device" to make the seller the agent of the State for collection of taxes. In leaving it to the States to determine whether they will tax the seller or the buyer, the Explanation has merely given recognition to a familiar principle of taxation laws sanctioned by usage and upheld by authority. This objection must accordingly be overruled.

It was then contended that the sales proposed to be taxed did not take place in Bihar as the goods were actually delivered as contemplated by the Explanation not there but in Bengal. The argument is that the words "actual delivery" in the Explanation are used in contrast to constructive or symbolic delivery as meaning physical delivery of goods, that under section 39 (1) of the Sale of Goods Act, 1930 (Act III of 1930) the common carrier is the agent of the purchaser, and that therefore delivery of the goods to the railway authorities in Bengal was actual delivery thereof to the purchaser in Bengal. Section 39 (1) is as follows:

> " Where in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, or delivery of the goods to a wharfinger for safe custody is *prima facie* deemed to be a delivery of the goods to the buyer ".

It is difficult to see what there is in this section to support the contention that delivery to a common carrier is actual delivery to the purchaser. The section does not say so. On the other hand, it proceeds on the assumption that there was, in fact, no delivery to the purchaser, actual or otherwise, a thing being deemed to be something only, when as a fact it is not that, and then enacts on that basis a fiction that delivery to a common carrier shall be deemed *prima facie* to be delivery to the buyer. What is the purpose of this fiction? It is, as will be clear from section 39 (2), to fix on whom the loss is to fall in case the goods are lost or damaged in course of transit. But where no such question arises, the fiction has to be ignored, and the matter will have to be decided on the factual basis whether the goods were actually delivered.

A reference to section 51 (1) of the Sale of Goods Act is very instructive. It runs as follows:

> " Goods are deemed to be in course of transit from the time when they are delivered to a carrier or other bailee for the purpose of transmission to the buyer, until the buyer or his agent in that behalf takes delivery of them from such carrier or other bailee ".

In this clause, the word "delivery" is used to denote both the delivery of goods by the seller to the common carrier and the delivery to the puchaser by the common carrier. They cannot both be actual deliveries, as goods sold under a sale can actually be delivered only once. If the delivery of the goods to the common carrier was actual delivery, then what is the nature of delivery when the purchaser took possession of the goods from the common carrier? It is also physical delivery of the goods, and is therefore actual delivery on the appellant's own definition.

The fact is that while for some purposes delivery to the common carrier is treated as delivery to the purchaser, there is delivery in fact and in its popular sense, only when the purchaser obtains possession of the goods and it is this that is connoted by the words "actual delivery". When section 51 (1) refers to delivery to buyer or his agent, it refers to actual delivery, and delivery to common carrier is regarded as constructive, having regard to section 39 (1). The section, it will be noticed, proceeds on the footing that a common carrier is not

the agent of the buyer with reference to actual delivery. He is the agent of the purchaser for transmission of the goods to him.

This position was well-established in the common law of England, and was thus stated by Parke, B., in *James* v. *Griffin*,[1] in the following terms:

"The delivery by the vendor of goods sold to a carrier of any description, either expressly or by implication named by the vendee, and who is to carry on his account, is a *constructive delivery to the vendee*; but the vendor has a right if unpaid, and if the vendee be insolvent, to retake the goods before they *are actually delivered to the vendee*, or some one whom he means to be his agent, to take possession of and keep the goods for him, and thereby to replace the vendor in the same situation as if he had not parted with the actual possession...... *The actual delivery to the vendee* or his agent, which puts an end to the *transitus* or state of passage, may be at the vendee's own warehouse, or at a place which he uses as his own, though belonging to another, for the deposit of goods: (*Scott* v. *Pettit*[2]: *Rowe Pickford*[3]; or at a place where he means the goods to remain until a fresh destination is communicated to them by orders from himself; *Dixon* v. *Baldwen*[4]; or it may be by the vendee's taking possession by himself or agent at some point short of the original intended place of destination".

In Ex parte *Rosevar China Clay Company*. In Re *Cock*[5], James, L.J., said:

"The authorities show that the vendor has a right to stop *in transitu* until the goods have *actually* got home into the hands of the purchaser, or of some one who receives them in the character of his servant or agent".

In the same case, the position was stated even more fully by Brett, L.J., in the following terms:

"As soon as the clay was appropriated by the vendors to this contract and was placed on board the ship, the property in it passed to the purchaser and at the same time as between the vendor and the purchaser, there was a delivery of the claim to the latter. But it was *a constructive not actual* delivery."

The same learned Judge again observed in *Kendal* v. *Marshall*[6] as follows:

"Where the goods have been appropriated by the vendor, and have been delivered by him to a carrier to be transmitted to the vendee, a *constructive possession exists in the vendee*".

The law as declared in the above decisions was embodied in section 32 (1) of the English Sale of Goods Act, which has been reproduced in section 51 (1) of the Indian Sale of Goods Act. *Vide* also Benjamin on Sales, Eighth Edn., page 889, where the possession of the carrier on behalf of the buyer is stated to be "*constructive* though *not yet actual* possession". It must accordingly be held that the expression "actual delivery" in the Explanation to Article 286 (1) (*a*) means delivery of the goods to the purchaser or his agent, and delivery to the common carrier is not actual delivery, and that, in this case, the goods were actually delivered not in Bengal when they were delivered to the common carrier but in Bihar when they were delivered to the purchaser. This contention of the appellant must also be rejected.

In the result, the appeal should, in my judgment, be rejected with costs.

Sinha, J.—I have had the advantage of perusing the judgments prepared by my brothers, S. R. Das, N. H. Bhagwati, B. Jagannadhadas and T. L. Venkatarama Aiyar. After a careful and anxious consideration of the two viewpoints contained in the judgments respectively of my brother S. R. Das holding that the previous decision of this Court in *The State of Bombay* v. *The United Motors (India) Ltd.*[7] should be overruled, and of my brother T. L. Venkatarama Aiyar that it should be followed, I have come to the conclusion that the latter view is more acceptable.

1. (1837) 2 M. &. W. 623; 150 E.R. 906, 910.
2. (1803) 3 Box & P. 469.
3. (1817) 8 Taunt. 83.
4. (1804) 5 East. 175.
5. (1879) L.R. 11 Ch. D. 560.
6. (1883) L.R. 11 Q.B.D. 356, 364.
7. (1953) S.C.R. 1069: (1953) S.C.J. 373: (1953) 1 M.L.J. 743 (S.C.).

We are all agreed that the present case is governed by the previous decision of this Court just referred to and that if that case lays down the correct rule of law, this appeal should be dismissed. We are also agreed that the language of Article 286 of the Constitution on which the case depends is not felicitous and free from vagueness, with the result that the interpretation of that article is not free from doubt and difficulty. The very fact that in the case referred to, as also in the later decision of this Court reported in *State of Travancore-Cochin* v. *Shanmugha Vilas Cashew Nut Factory*[1] involving the construction of Article 286, the Court was divided in its opinion shows that the interpretation of the articles in question is by no means easy. The fact that the Court is sharply divided in the present case also emphasizes the difficulty. The question we have to determine at the outset is whether or not we should follow the previous decision of this Court in *The State of Bombay* v. *The United Motors (India) Ltd.*[2] We are all agreed that in a proper case it is permissible for this Court to go back upon its previous decision; but we are again divided as to whether this is a fit occasion for reviewing its previous decision. For the reasons given by my brothers, Jagannadhadas and Venkatarama Ayyar, I would agree with them in holding that sufficient grounds have not been made out for overruling that decision which had been taken after hearing all the parties interested in the result of the case. Not only the parties directly concerned with the case but a number of States by way of interveners as in the present case were also heard. After giving a very full hearing the Court gave its judgment which is a very elaborate one,—the report of the case running into 60 pages in print. It is true that much can be said for the opposite view as adumberated in the judgment of my brother S. R. Das; but, in my opinion, simply because another view may be taken of the points in controversy is not a sufficient justification for our reviewing the previous judgment of this Court. It has not been suggested that any relevant provisions of the Indian Constitution or any other provision of law had been overlooked by this Court when it pronounced its previous ruling; nor has it been suggested that this Court on the previous occasion proceeded on erroneus suppositions. Under the Constitution and even otherwise this Court is naturally looked upon by the country as the custodian of law and the Constitution, and if this Court were to review its previous decisions simply on the ground that another view is possible, the litigant public may be encouraged to think that it is always worthwhile taking a chance with the highest Court in the land. Definiteness and certainty of the legal position are essential conditions for the growth of the rule of law. In my opinion, therefore, this Court should review its previous decisions only in exceptional circumstances as is the practice of the Judicial Committee of the Privy Council in the cases referred to by my brothers Jagannadhadas and Venkatarama Ayyar. If this Court has taken a view of the relevant provisions of the Constitution which does not commend itself to the acceptance of the Legislature, the latter can make necessary amendments, as has been done in the recent past.

Coming to the merits of the case in hand, we are all agreed that the Explanation to Article 286 (1) (*a*) of the Constitution has created a legal fiction as a result of which a transaction of sale or a purchase partaking of an inter-State character has been treated as a domestic transaction. The fiction has localized sales or purchases contemplated by the Explanation, by converting such transactions as would otherwise have been inter-State sales or purchases into sales or purchases inside one State in a sense in which it is placed in a class distinct and separate from what is referred to as sales or purchases "outside the State" in the main body of Article 286 (1) (*a*) which prohibits imposition of tax by any State. There is a general agreement amongst us, I take it,

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1. (1954) S.C.R. 53 : (1953) S.C.J. 471 : (1953) 2 M.L.J. 123 (S.C.).
2. (1953) S.C.R. 1069 : (1953) S.C.J. 373 : (1953) 1 M.L.J. 743 (S.C.).

that the main purpose of creating the fiction is to prevent multiple taxation of the same transaction, but, it may be added, not altogether to stop the taxation of such transactions. We are also agreed that full effect must be given to the legal fiction on the supposition that the putative state of affairs is the real one. While thus agreeing on the general principle bearing on the question of the purpose and scope of a legal fiction, we are again divided on the question of how far the legal fiction should be carried in its actual application. For the reasons given by my brother Venkatarama Ayyar, I agree with him that the fiction created by the Explanation brings such a sale within the taxing power of the State within which such a sale is said to have taken place. Such a result is brought about not by holding that the Explanation has conferred positively the power on the relevant State to impose sales-tax, but by holding that such an inside sale is beyond the scope of the prohibition contained in the main body of Article 286 (1) (*a*) which interdicts the imposition of a tax on a sale "outside the State". The Explanation has got to be read as an integral part of Article 286 (1) (*a*), and thus read, it means negatively that a sale or purchase outside a State cannot be taxed; and by necessary implication, that a sale or purchase inside a State may be taxed by that State as falling outside the mischief of the prohibition directed against the imposition of a tax on a sale or purchase of goods outside a State; in other words, as soon as a sale or purchase of goods is declared to be outside the pale of the prohibition contained in Article 286 (1) (*a*), the State's power of imposing a tax contained in Article 246 read with item 54 of List II of the 7th Schedule comes into operation. I do not find myself in agreement with the view propounded by my brother S. R. Das, chiefly because that view goes beyond the purpose of the creation of the fiction which admittedly was to prevent multiple taxation. The view as propounded by him besides preventing multiple taxation goes to the length of prohibiting any imposiion of sales-tax by any State. Such, in my opinion, was not the intention of the Constitution. Whereas the imposition of multiple sales-tax on transactions of sale or purchase may be an obstacle to the free flow of inland trade and commerce, the imposition of sales-tax by a single State in which the sale is deemed to have taken place by virtue of the Explanation cannot be predicated as having such an effect. The view propounded by my learned brother Venkatarama Ayyar is thus not inconsistent with the avowed purpose of the Constitution, as expressed in Article 301, which provides that trade, commerce and intercourse shall be free throughout the territory of India. In my opinion, the view propounded by my learned brother S. R. Das about the actual application of the legal fiction stops short of giving full effect to that fiction. Allied with this question is the controversy as to whether clause (2) of Article 286 is subject to Article 286 (1) (*a*) read with the Explanation or *vice versa*. In my opinion, for the reasons given by my learned brother Venkatarama Ayyar the better view is that clause (2) of Article 286 of the Constitution is subject to Article 286 (1) (*a*) read with the Explanation. On the whole, therefore I would agree with the view that the previous decision of this Court in 1953 S.C.R. 1069 should continue to hold good and govern the present controversy also. In that view of the matter I would dismiss this appeal with costs.

By the Court.—The appeal is allowed and an order shall be issued directing that, until Parliament by law provides otherwise, the State of Bihar do forbear and abstain from imposing sales-tax on out-of-State dealers in respect of sales or purchases that have taken place in the course of inter-State Trade or commerce even though the goods have been delivered as a direct result of such sales or purchases for consumption in Bihar. The State must pay the costs of the appellant in this Court and in the Court below. The interveners must bear and pay their own costs.

Appeal allowed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—VIVIAN BOSE, N. H. BHAGWATI, B. JAGANNADHADAS, BHUVANESHWAR PRASAD SINHA AND SYED JAFER IMAM, JJ.

Shrimati Sucheta Kripalani .. *Appellant**

v.

Shri S. S. Dulat, I.C.S., Chairman of the Election Tribunal, Delhi and others .. *Respondents.*

Representation of the People Act (XLIII of 1951), *section* 143 *and Representation of the People (Conduct of Elections and Election Petitions) Rules,* 1951—*Rule* 114 (6)—*Tribunal's jurisdiction to enquire into minor corrupt practice.*

Where the allegation about the minor corrupt practice does not stand by itself and there are also allegations about major corrupt practices which require investigation and the minor corrupt practices alleged are reasonably connected with them, the Tribunal is bound under section 143 of the Representation of the People Act, 1951, also to inquire into the question of the falsity of the return. Without such an enquiry it cannot reach the finding which section 143 contemplates.

If a return is not in proper form, disqualification ensues but the Election Commission is invested with the power to remove the disqualification under rule 114 (6). If it does, the position becomes the same as it would have been had the Election Commission decided that the form was proper in the first instance.

Appeal under Articles 132 and 133 of the Constitution of India against the Judgment and Order dated the 23rd December, 1953, of the High Court of Judicature for the State of Punjab in Civil Writ Application No. 24 of 1953.

N. C. Chatterjee, Senior Advocate (*R. S. Narula*, Advocate with him) for the Appellant.

G. S. Pathak and *Veda Vyas*, Senior Advocates (*Ganpat Rai*, Advocate with him) for the Respondent No. 5.

The Judgment of the Court was delivered by

Bose, J.—The proceedings that have given rise to this appeal arise out of an election petition before the Election Tribunal, Delhi.

The appellant Shrimati Sucheta Kripalani together with the contesting respondent Shrimati Manmohini Sahgal and others were candidates for election to the House of the People from the Parliamentary Constituency of New Delhi. The polling took place on 14th January, 1952, and when the votes were counted on 18th January, 1952, it was found that the appellant had secured the largest number of votes and that the contesting respondent Manmohini came next. The appellant was accordingly notified as the returned candidate on 24th January, 1952.

On 6th March, 1952, the appellant filed her return of election expenses. This was found to be defective, and on 17th April, 1952, the Election Commission published a notification in the *Gazette of India* disqualifying the appellant under rule 114 (5) of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951, on the ground that she had

"failed to lodge the return of election expenses in the manner required" and that she had thereby

"incurred the disqualifications under clause (*c*) of section 7 and section 143 of the Representation of the People Act, 1951."

In view of this the appellant submitted a fresh return with an explanation under rule 114 (6) on 30th April, 1952. This was accepted by the Commision and on 7th May, 1952, it published a notification in the *Gazette of India* under rule 114 (7) stating that the disqualification had been removed.

In the meanwhile, on 7th April, 1952, the contesting respondent Manmohini filed an election petition praying that the appellant's election be declared void and

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* Civil Appeal No. 139 of 1955. 6th September, 1955.

that she (the petitioner) be declared to have been duly elected. It will be noticed that this was before 17th April, 1952, the date on which the Election Commission disqualified the appellant. The validity of the election was attacked on many grounds. A number of major corrupt practices were alleged and the return which the appellant had filed on 6th March, 1952, of her election expenses was challenged as a minor corrupt practice on two grounds:

(1) that the return was false in material particulars and (2) that it was not in accordance with the rules and so was no return at all in the eye of the law. Particulars of the instances in which the return was challenged as false were then set out.

The appellant filed her written statement in reply on 7th October, 1952. It will be noticed that this was after she had put in her second return and after the Election Commission had removed the disqualification due to the first return. Her reply was as follows:

(1) That as the disqualification with respect to the return of her election expenses had been removed by the Election Commission under section 144 of the Representation of the People Act, 1951, this question could not be reopened;

(2) That a minor corrupt practice which cannot vitiate an election and which is not capable of materially affecting an election is wholly outside the scope of a proper election petition and so no cognisance of it can be taken by the Election Tribunal;

(3) That only such matters can be put in issue as are necessary to decide whether the election of the returned candidate is liable to be set aside within the meaning of section 100 (2) of the Act.

The contesting respondent Manmohini filed a replication on 15th October, 1952. In it she said:—

(1) that the Election Commission did not and could not decide whether the return was or was not false in material particulars and so the question was still open. (This had reference to the first return dated 6th March, 1952);

(2) that in any event

"even the *revised return* is false in material particulars and the objections with regard to the original return also apply *exactly* with regard to the revised return."

The broad propositions of law raised by points (2) and (3) in the appellant's written statement were also denied. Then followed an item by item reply to the allegations made by the appellant in the list which she had appended to her written statement. That list was a reply to the particulars of false return and corrupt practices furnished by the contesting respondent Manmohini. It is evident then that Manmohini attacked the second return on exactly the same grounds as the first and furnished the same particulars.

Now we have spoken of these returns as the first and the second. But counsel on both sides agreed before us that the first return was in fact no return at all in the eye of the law and that therefore the contesting respondent's real attack was on the second return which must be regarded as the only return which the law will recognise as a valid return. It was agreed that there cannot be two returns of expenses: either the one originally filed is amended or it is treated as a nullity so far as it purports to be a return. In view of this agreement, it is not necessary for us to express any opinion on the matter and we will concentrate our attention on what, for convenience, we will continue to call the second return.

The first point that now arises is whether the decision of the Election Commission to remove the disqualification attaching to the first return precludes an enquiry into the falsity of the *second* return simply because the respondent Manmohini alleged that the particulars of the falsity are exactly the same as before. Our answer to that is No. If the first return is no return in the eye of the law, then the only return we are concerned with is the second and that must be treated in the same way as it would have been if it had been the only return made. If there had been no other return and this return had been challenged on the grounds

now raised, it is clear that the truth of the allegations made would have to be enquired into. That enquiry cannot be shut out simply because the allegations against the second return happen to be exactly the same in the matter of its falsity as in the case of the first return. We are therefore of opinion that the jurisdiction of the Tribunal to enquire into these matters was not ousted on that account. Our reasons for this are these:

Section 76 of the Act requires every candidate to file a return of election expenses in a particular form containing certain prescribed particulars. The form and particulars are set out in the rules. Section 143 prescribes the penalty for failure to observe those requirements. It is disqualification. This ensues if there is a "default" in making the return. It also ensues :—

> "if such a return is found. . . . . upon the trial of an election petition under Part VI . . . . . . to be false in any material particular."

That places the matter beyond doubt. The trial of an election petition is conducted by an Election Tribunal and this section makes it incumbent on the Tribunal to enquire into the falsity of a return when that is a matter raised and placed in issue and the allegations are reasonably connected with other allegations about a major corrupt practice. The jurisdiction is that of the Tribunal and not of the Election Commission. The duty of the Election Commission is merely to decide under rule 114 (4) whether any candidate has, among other things,

> "failed to lodge the return of election expenses . . . . in the manner required by the Act and these rules."

It is a question of form and not of substance. If the return is in proper form no question of falsity can arise unless somebody raises the issue. If it is raised, the allegations will be made in some other document by some other person and the charges so preferred will be enquired into by the Tribunal.

If the return is not in proper form, disqualification ensues but the Election Commission is invested with the power to remove the disqualification under rule 114 (6). If it does, the position becomes the same as it would have been had the Election Commission decided that the form was proper in the first instance. That would still leave the question of falsity for determination by the Tribunal in cases where the issue is properly raised.

Mr. Chatterjee contended on behalf of the appellant that we were not concerned with the second return in this appeal and strongly protested against Mr. Pathak being allowed to argue this point. But that has been the main bone of contention almost from the start. When the election petition was filed, there was only one return to attack. The second had not been put in. Later, when it was put in, the contesting respondent, Manmohini, attacked both and the appellant herself said that questions about the falsity of the return could not be gone into because of the Election Commission's order removing the disqualification. That argument applies as much to the second as to the first return and raises an issue about the respective jurisdictions of the Election Commission and the Election Tribunal on this point. The tribunal decided against the appellant on this point and held, as we do, that the Election Commission was not concerned with the issue of fact about the falsity of the return. The appellant then filed a petition under Article 226 to the High Court and questioned the Tribunal's jurisdiction to enquire into the issue of falsity. The High Court upheld the Tribunal's decision and the appellant pursued the matter here both in her grounds of appeal and in her statement of the case. She cannot at this stage ask us to leave the matter open so that she can come here again and re-agitate this question. We accordingly overrule Mr. Chatterjee's objection.

The next question argued was whether an Election Tribunal can enquire into a minor corrupt practice if it is of such a nature that, standing by itself, it could not have been made the basis of an election petition because it could not materially affect the result of the election. We need not go into that because the question is purely academic in this case. The allegation about the minor corrupt

practice does not stand by itself. There are also allegations about major corrupt practices which require investigation and the minor corrupt practices alleged are reasonably connected with them. Section 143 of the Act is a complete answer to the question of the Tribunal's jurisdiction on this point when it is properly seised of the trial of an election petition on other grounds. Whether it could be properly seised of such a trial if this had been the only allegation, or if the minor corrupt practice alleged was not reasonably connected with the other allegations about major corrupt practices, does not therefore arise. As the trial is proceeding on the other matters the Tribunal is bound under section 143, now that the issue has been raised, also to enquire into the question of the falsity of the return. Without such an enquiry it cannot reach the finding which section 143 contemplates. We need not look into the other sections which were touched upon in the arguments and in the Courts below because section 143 is clear and confers the requisite jurisdiction when a trial is properly in progress.

The appellant has failed on every question of substance that she raised. There was some vagueness in the Election Tribunal's order about which of the two returns formed the basis of the enquiry on this point but even if the Tribunal intended to treat the first return as the basis, that did not really affect the substance because exactly the same allegations are made about the second return and the issue of fact would therefore have to be tried in any event. The appellant's whole endeavour was to circumvent such an enquiry and oust the Tribunal's jurisdiction. In that she has failed, so she will pay the contesting respondent's costs throughout.

The appeal fails and is dismissed with costs all throughout.

Appeal dismissed.

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction.]

PRESENT :—S. R. DAS, *Acting Chief Justice*, and T. L. VENKATARAMA AYYAR, J.

Tirath Singh .. *Appellant**

v.

Bachittar Singh and others .. *Respondents.*

Representation of the People Act (XLIII of 1951), *section* 99—*Scope—Issue of notice to persons to be named before recording a finding under section* 99 (1) (*a*)—*If obligatory.*

While the persons to be named under section 99 (1) (*a*) (ii) would include both parties to the petition as well as non-parties, the Proviso thereto applies only to persons who had no opportunity of taking part in the trial, and therefore, whether notice should issue under the Proviso will depend on whether the person had an opportunity to cross-examine witnesses who had given evidence against him and to adduce his own evidence. Notice to persons who are not parties to the petition will be necessary under the Proviso before they are named.

Appeal under Article 133 (1) (*c*) of the Constitution of India against the Judgment and Order dated the 12th January, 1954, of the Pepsu High Court in Civil Misc. No. 182 of 1953.

M. C. Setalvad, Attorney-General of India, *Veda Vyas* and *Jagannath Kaushal*, Senior Advocates (*Naunit Lal*, Advocate, with them) for the Appellant.

Nemo, for the Respondents.

The Judgment of the Court was delivered by

Venkatarama Ayyar, J.—The appellant was a candidate for election to the Legislative Assembly of the State of Pepsu from the Dhuri Constituency, and having secured the largest number of votes was declared duly elected. The first respondent who is one of the electors in the Constituency filed the petition out of which the present appeal arises, for setting aside the election on the grounds, *inter alia* (1) that the nomination of one Mali Singh had been wrongly rejected by the returning officer

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*Civil Appeal No. 21 of 1955. 15th September, 1955.

and (2) that the appellant was guilty of the corrupt practice of bribery. The Tribunal held that both these grounds were made out, and accordingly set aside the election. It further recorded a finding in terms of section 99 (1) (*a*) of the Representation of the People Act No. XLIII of 1951 that the appellant was proved to have committed the corrupt practice of bribery as mentioned in section 123 (1) of the Act. The Appellant thereupon filed in the High Court of Patiala and East Punjab States Union an application under Article 227 attacking the finding of the Tribunal that he was guilty of bribery. The order of the Tribunal in so far as it set aside his election was not challenged. By order dated 12th January, 1954, the High Court upheld the findings of the Tribunal, and dismissed the application, and by order dated 7th June, 1954, granted a certificate for appeal to this Court under Article 133 (1) (*c*). That is how the appeal comes before us.

On behalf of the appellant, the learned Attorney-General raised two contentions : (1) The finding that the appellant was guilty of bribery was reached in disregard of the mandatory provisions of section 83, and that it was besides open to other legal objections ; and (2) the finding recorded under section 99 of the Act was bad, because no notice was given to the appellant, and no enquiry held as required by the proviso to section 99. This point was not taken in the application under Article 227, and was sought to be raised at the time of the argument in the High Court ; but the learned Judges declined to entertain it.

(1) On the first question, the complaint of the appellant is that in the election petition the allegations relating to bribery were vague and wanting in particulars, and that the petition should accordingly have been dismissed under section 83 and 85 of the Act ; that the charge that was sought to be proved at the hearing was at variance with the charge as alleged in the petition, and that the Tribunal had erred in giving a finding of bribery on the basis not of the allgations in the petition but of the evidence adduced at the trial. The allegations in the petition relating to this charge are as follows :

"The sweepers of Small Town Committee, Dhuri, were each granted good work allowance at Rs. 5 per mensem for three months only during Election days, simply because they happened to be voters in the said Constituency, *vide* letter No. ST/1 (4)/52/20702, dated 7th December, 1951. All this was done to induce these sweepers to vote for the respondent No. 1. The allowance was against the Rules ".

The reply of the appellant to this charge was as follows :

"The sweepers of Small Town Committee represented to me in writing that their pays should be increased, and they also quoted the pays that the employees of other Small Town Committee and Municipal Committees were getting. The representation was forwarded to the Secretariat. The Secretariat examined it on merits, passed legal orders. Such concessions were also shown to other employees of the various Small Town Committees and Municipal Committees in Pepsu before and after this case. This was an official act done in the routine and not to induce the sweepers to vote for respondent No. 1 ".

On these averments, the following issue was framed :

"5. Whether the sweepers of Small Town Committee, Dhuri, were granted good work allowance at Rs. 5 per mensem for three months only during the election days in order to induce them to vote for the Respondent No. 1 ?"

At the trial, the petitioner examined the Darogha of the Small Town Committee (P.W. 28), and five sweepers, P.Ws. 12, 13, 14, 39 and 40, and their evidence was that sometime in November, 1951, the appellant came to Dhuri, enquired about the number of sweepers in the service of the Committee, and offered to raise their pay if they would vote for him, that the sweepers thereupon held a meeting and considered the suggestion of the appellant, and then decided to vote for him, if the pay was increased. It must be stated that the appellant was then Minister for Health, and was in charge of Local Administration. On 28th November, 1951, he passed an order on a memorial sent by the sweepers that their pay would be increased by Rs. 5 per mensem. Objection to the order was taken by the Department, and thereupon, the appellant passed the modified order dated 7th December, 1951, granting good work allowance for a period of three months from December, 1951, to February, 1952. The Tribunal accepted the evidence on the side of the petitioner that the appellant offered to increase the salary of the sweepers in 1951, and held

that the order dated 7th December, 1951, granting good work allowance for the election period was the outcome of the bargain come to in November, 1951, and that the charge of bribery had been established.

It is contended for the appellant that in the petition there was no mention of the bargain on which the finding of bribery by the Tribunal was based, that the charge in the petition related only to the order dated 7th December, 1951, and that accordingly it was not open to the petitioner to travel beyond the petition and adduce evidence in proof of a bargain which had not been pleaded. This is to put too technical and narrow a construction on the averments. The charge in the petition was not merely that the appellant had passed the order dated 7th December, 1951, but that he had passed it with a view to induce the sweepers to vote for him. That clearly raised the question as to the circumstances under which the order came to be passed, whether it was in the course of official routine as the appellant pleaded, or under circumstances which were calculated to influence the voters. Issue 5 put the matter beyond doubt, when it pointedly raised the question whether the grant was "for three months only during the election days in order to induce them (the sweepers) to vote for the respondent No. 1". Under the circumstances, the complaint that the evidence and the finding as to the bargain went beyond the pleadings and should be ignored appears to be without any substance. It may be that the allegations in the petition are not as full as they might have been; but if the appellant was really embarrassed by the vagueness of the charge, it was open to him to have called for particulars; but he did not do so. At the trial, the petitioner first adduced evidence, and his witnesses spoke to the bargain in November, 1951. It is stated on behalf of the appellant that he objected to the reception of the evidence on the question of bargain, as it was not pleaded. But this is denied by the petitioner in his affidavit filed in the High Court dated 3rd December, 1953. Even apart from this, the witnesses on behalf of the petitioners gave evidence on this point on the 8th and 11th November, 15th and 16th December, 1952, and on the 2nd February, 1953. Then the appellant entered on his defence. On 26th February, 1951, he examined R.W.4, a member of the Small Town Committee to rebut the evidence on the side of the petitioner, and himself went into the box and deposed to the circumstances under which the order came to be passed. Having regard to the above facts, there is and can be no complaint that the appellant was misled, or was prejudiced by the alleged defect in the pleadings. The contention that is urged for him is that the petition should have been dismissed under section 83 for want of particulars. This was rightly rejected by the High Court as without force, and we are in agreement with it.

It is next contended that there is no evidence or finding that the sweepers were entitled to vote in the Constituency or that the appellant was a candidate as defined in section 79 (2) at the time when the bargain was made. But the allegation in the petition is clear that the order dated 7th December, 1951, was made with a view "to induce the sweepers to vote for the appellant". The reply of the appellant to this was that the order was made in the course of official routine and "not to induce the sweepers to vote" for him. Far from there being any specific denial that the sweepers were electors, the reply of the appellant proceeds on the basis that they were entitled to vote. This objection was not raised before the Tribunal, and, as pointed out by the High Court, P.W. 12 does say in his evidence that he is a voter. This contention must accordingly be overruled. Nor is there any substance in the contention that there is no proof that the appellant was a candidate at the time of the bargain. This again is an objection which was not taken before the Tribunal, and on the evidence of the witnesses examined on the side of the petitioner which was accepted by the Tribunal, the appellant would be a prospective candidate as defined in section 79 (*b*) of the Act. The finding that the appellant is guilty of bribery is therefore not open to attack.

(2) It is next contended that the order of the Tribunal in so far as it recorded a finding that the appellant had committed the corrupt practice specified in section 123 (1) is bad, as no notice was given to him as required by the proviso to section 99 and no opportunity to show cause against it. Section 99 runs as follows:

"99. (1) At the time of making an order under section 98 the Tribunal shall also make an order—

(*a*) whether any charge is made in the petition of any corrupt or illegal practice having been committed at the election, recording—

(i) a finding whether any corrupt or illegal practice has or has not been proved to have been committed, by, or with the connivance of, any candidate or his agent at the election, and the nature of that corrupt or illegal practice; and

(ii) the names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt or illegal practice and the nature of that practice, together with any such recommendations as the Tribunal may think proper to make for the exemption of any persons from any disqualifications which they may have incurred in this connection under sections 141 to 143.

* * * * * *

Provided that no person shall be named in the order under sub-clause (ii) of clause (*a*) unless—

(*a*) he has been given notice to appear before the Tribunal and to show cause why he should not be so named; and

(*b*) if he appears in pursuance of the notice, he has been given an opportunity of cross-examining any witness who has already been examined by the Tribunal and has given evidence against him, of calling evidence in his defence and of being heard . . . . . ."

The point for decision is whether it was obligatory on the part of the Tribunal to issue notice under the above proviso to *parties to the election petition* before recording a finding under section 99 (1) (*a*). The contention of the appellant is that under section 99 (1) (*a*) the Tribunal has to record the names of all *persons* who are proved to have been guilty of corrupt or illegal practice, that that would include both parties to the petition as well as non-parties, that the proviso requires that notice should be given to all persons who are to be named under section 99 (1) (*a*), sub-clause (ii), and that the appellant was accordingly entitled to fresh notice under the proviso. It is argued that if the language of the enactment is interpreted in its literal and grammatical sense, there could be no escape from the conclusion that parties to the petition are also entitled to notice under the proviso. But it is a rule of interpretation well-established that,

"Where the language of a statute in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence." (Maxwell's Interpretation of Statutes, 10th Edition, page 229).

Reading the proviso along with clause (*b*) thereto, and construing it in its setting in the section, we are of opinion that notwithstanding the wideness of the language used, the proviso contemplates notice only to persons who are not parties to the petition.

The object of giving notice to a person under the proviso is obviously to give him an opportunity to be heard before a finding is given under section 99 (1) (*a*) (i) that he has committed a corrupt or illegal practice. This clearly appears from clause (*b*) of the proviso, which enacts that the person to whom notice is to be given should have an opportunity of cross-examining witnesses who had been examined before and given evidence against him, of calling his own evidence and of being heard. This is in accordance with the rule of natural justice which requires that no one should be condemned without being given an opportunity to be heard. The reason of the rule, therefore, requires that notice should be given to persons who had had no previous opportunity in respect of the matters mentioned in sub-clause (*b*) to the proviso. Such for example would be witnesses and possibly agents of the parties as observed in *Nyalchand Virachand* v. *Election Tribunal*[1], though it is not necessary to decide that point, but it cannot refer to parties to the petition who have had every opportunity of taking part in the trial and presenting their case. Where an election petition is founded on a charge of corrupt practice on the part of the candidate, that becomes the subject-matter of enquiry in the petition itself. If at the trial the Tribunal came to the conclusion that the charge had been proved, then it has to

1. 8 Election Law Reports 417, 421.

hold under section 100 (2) (*b*) that the election is void, and pass an order to that effect under section 98 (*d*). Section 99 (1) enacts that the finding of corrupt practice under section 99 (1) (*a*) (i) or naming a person under section 99 (1) (*a*) (ii) should be at the time of making an order under section 98. If the contention of the appellant is to be accepted, then the result will be that even though there was a full trial of the charges set out in the petition, if the Tribunal is disposed to hold them proved it has first to give notice of the finding which it proposes to give, to the parties, and hold a fresh trial of the very matters that had been already tried. That is an extraordinary result, for which it is difficult to discover any reason or justification. It was argued by the learned Attorney-General that the giving to a party to a proceeding a second opportunity to be heard was not unknown to law, and he cited the instance of an accused in a warrant case being given a further opportunity to recall and cross-examine prosecution witnesses after charge is framed, and of a civil servant being given an opportunity under Article 311 to show cause against the action proposed to be taken against him. In a warrant case, the accused is not bound to cross-examine the prosecution witnesses before charge is framed, and in the case of civil servants, the decision that they are entitled to a second opportunity was based on the peculiar language of sections 240 (2) and (3) of the Government of India Act, 1935, and Article 311 of the Constitution. They are exceptional cases, and do not furnish any safe or useful guidance in the interpretation of section 99.

The appellant also sought support for his contention that notice should be given under the proviso even to persons who are parties to the election petition, in the provision in section 99 (1) (*a*) (ii) that the Tribunal might make such recommendation as it thinks proper for exemption of any persons from any disqualifications which may have been incurred under sections 141 to 143. The argument is that the disqualifications mentioned in section 143 could only be with reference to candidates, as they relate to default in filing return of election expenses or in filing false returns, that before the Tribunal could take action under this provision it would have to give notice to the persons affected thereby who must necessarily be parties to the petition, and that if the proviso applies when action is to be taken under section 143, there is no reason why it should not apply when action is to be taken under the other sections of the Act as well.

The fallacy in this argument is in thinking that notice to a person is requisite for making a recommendation under section 99 (1) (*a*) (ii). Section 99 (1) (*a*) (ii) deals with two distinct matters—naming persons who are proved to have been guilty of corrupt and illegal practices, and recommending whether there should be any exemption in respect of the disqualifications mentioned in sections 141 to 143, and the proviso, properly construed, requires notice only in the former case and not the latter. It will be noticed that while in cases falling within sections 139 and 140 the disqualification is automatic and immutable, in cases falling within sections 141 to 143 the Election Commission has power to grant exemption under section 144 of the Act. It is to guide the Commission in exercising its powers under section 144, that the Tribunal is directed in section 99 (1) (*a*) (ii) to make any recommendations with reference thereto. The jurisdiction of the Tribunal in respect of this matter is purely advisory. There is nothing to prevent the Commission from taking up the question of exemption under section 144 *suo motu*, even though the Tribunal has made no recommendation. Indeed, there is nothing to prevent the person adversely affected from applying directly to the Commission for exemption. While, therefore, there is compelling reason why a person should have an opportunity of showing cause before he is named, there is none such when the question is one of recommendation. As we construe the proviso, it confers no right on any person, party or stranger, to be heard on the question whether he should be recommended for exemption from the disqualifications under sections 141 to 143. The provision for exemption in section 99 (1) (*a*) (ii) therefore does not lend any support to the contention of the appellant that notice should be given to parties to the petition under the proviso before they are named.

Reliance was also placed by the appellant on the decision of the Election Tribunal in *Kesho Ram* v. *Hazura Singh*[1], wherein it was held by a majority that notice under the proviso to section 99 should be given to the parties to the petition also. For the reasons given above, we do not agree with the decision of the majority.

Our conclusion is that while the persons to be named under section 99 (1) (*a*) (ii) would include both parties to the petition as well as non-parties, the proviso thereto applies only to persons who had no opportunity of taking part in the trial and that, therefore, whether notice should issue under the proviso will depend on whether the person had an opportunity to cross-examine witnesses who had given evidence against him and to adduce his own evidence. This conclusion is in accord with the law in England. Under section 140, sub-clause (1) of the Representation of the People Act, 1949, an election Court has to state in its report the names of all persons who are found guilty of corrupt and illegal practice but "in the case of some one who is not a party to the petition nor a candidate on behalf of whom the seat or office is claimed by the petition", the Court has to issue notice to him, give him an opportunity of being heard by himself, and calling evidence in his defence. It was suggested for the appellant that the law as enacted in section 99 makes a deliberate departure from that under section 140 (1) of the English Act. The difference in the wording between the two sections is due to the difference in the arrangement of the topics of the two statutes, and there is no reason to hold that with reference to the substance of the matter, there was any intention to depart from the English law on the subject; nor is there any reason therefor.

In the present case, the appellant was a party to the petition, and it was his election that was being questioned therein. He had ample opportunity of being heard, and was, in fact, heard, and therefore there was no need to isue a notice to him under the proviso to section 99 before recording a finding under section 99 (1) (*a*) (i). Further, even if we agree with the contention of the appellant that notice under the proviso should be given to a party to the petition, seeing that the reliefs which could be claimed in the election petition under section 84 are those mentioned in section 98, and that action under section 99 (1) (*a*) is to be taken at the time when the order under section 98 is pronounced, there is no insuperable difficulty in treating the notice to the party in the election petition as notice for purposes of the proviso to section 99 (1) (*a*) as well. This reasoning will not apply to persons who are not parties to the petition, and a notice to them will be necessary under the proviso, before they are named.

In the result, all the contentions urged in support of the appeal fail, which must accordingly be rejected. As the respondent has not appeared to contest the appeal, there will be no order as to costs.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—S. R. DAS, *Acting Chief Justice* and T. L. VENKATARAMA AYYAR, J.

S. Khader Sheriff .. *Petitioner**

v.

Munnuswami Gounder and others .. *Respondents.*

Representation of the People Act (XLIII of 1951), *section* 123 (7) *and Rule* 117 *of the rules—Election expenses—Payment to Congress Committee for seeking permission to contest election as a Congress candidate—How far election expenses to be included in the return, section* 99, *proviso—Person who had opportunities to meet the very charge in respect of which finding was recorded under section* 99 (1) (*a*)—*If entitled to further notice under the proviso.*

On 12th September, 1951, the appellant applied to the Tamil Nad Congress Committee for permission to contest the election to the Legislative Assembly as a Congress candidate, and along with

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1. 8 Election Law Reports 320.

* Civil Appeal No. 26 of 1955. 15th September, 1955.

his application he paid Rs. 500 out of which Rs. 100 was subscription for membership and Rs. 400 deposit, which was liable to be returned under the rules, in case the applicant was not adopted as the candidate but not otherwise. In fact, the appellant was adopted as the Congress candidate and it was on that ticket that he fought and won the election. On 23rd September, 1951, another payment of Rs. 500 was made to the North Arcot District Congress Committee, which was in charge of the Ranipet constituency. The Tribunal held that both these sums were paid for purposes of election and should have been included in the return made by the appellant, that if they were so included, the maximum prescribed was exceeded, and that therefore section 123 (7) had been contravened, and accordingly declared the election void under section 100 (2) (*b*) of the Act. The Tribunal also recorded as part of the order a finding that the appellant had become subject to the disqualifications specified in section 140, sub-clauses (1) (*a*) and (2). This finding was attacked on the ground that it was given without notice to him as required by the proviso to section 99.

Held: Under section 79 (*b*) of the Representation of the People Act the candidature commences when the person begins to hold himself out as a prospective candidate. The determining factor is the decision of the candidate himself, not the act of other persons or bodies adopting him as their candidate. The appellant was a prospective candidate when he made the payment of Rs. 500 on 12th September, 1951.

While it is meritorious to make a donation for charitable purposes, if that is made at the time or on the eve of an election, it is open to the charge that its real object was to induce the electors to vote in favour of the particular candidate, and should therefore be treated as election expense. Accordingly the payment of Rs. 500 made to the North Arcot District Congress Committee on 23rd September, 1951, must be held to be spent for purposes of election.

If the party had opportunity given to him in the hearing of the petition to meet the very charge in respect of which a finding is to be recorded under section 99 (1) (*a*), then he is not entitled to a further notice in respect of the same matter, under the proviso.

Appeal under Article 136 of the Constitution of India from the Judgment and Order, dated the 28th February, 1953, of the Election Tribunal, Vellore, in Election Petition No. 84 of 1954.

N. C. Chatterjee, Senior Advocate (*R. Ganapathy Iyer*, Advocate, with him) for Appellant.

Naunit Lal, Advocate for Respondent No. 1.

The Judgment of the Court was delivered by

Venkatarama Ayyar, J.—This is an appeal by special leave against the order of the Election Tribunal, Vellore, declaring the election of the appellant to the Legislative Assembly void on the ground that there had been a violation of section 123 (7) of the Representation of the People Act No. XLIII of 1951. Under that section, it is a major corrupt practice for a candidate or his agent to incur or authorise the incurring of expenditure in contravention of the Act or any rule made thereunder. Rule 117 provides that:

"No expense shall be incurred or authorised by a candidate or his election agent on account of or in respect of the conduct and management of an election in any one Constituency in a State in excess of the maximum amount specified in respect of that Constituency in Schedule V".

Under Schedule V, the maximum expense specified for election to the Madras State Legislature from a single-member Constituency, such as Ranipet, is Rs. 8,000. The return of the expenses lodged by the appellant showed that he had spent in all Rs. 7,063 for the election, and that was within the limit allowed. The charge against him in the petition was that he had failed to disclose in his return two sums of Rs. 500 each, spent for election purposes, and that with the addition of those amounts, the maximum specified had been exceeded. As regards the first amount, the facts found are that on 12th September, 1951, the appellant applied to the Tamil Nad Congress Committee for permission to contest the election as a Congress candidate, and along with his application he paid Rs. 500 out of which Rs. 100 was subscription for membership and Rs. 400 deposit, which was liable to be returned under the rules, in case the applicant was not adopted as the candidate, but not otherwise. In fact, the appellant was adopted as the Congress candidate, and it was on that ticket that he fought and won the election. The second payment of Rs. 500 was on 23rd September, 1951, to the North Arcot District Congress Committee, which was in charge of the Ranipet Constituency. The Tribunal held that both these sums were paid for purposes of election and should have been included in the return made by the appellant, that if they were so included, the maximum

prescribed was exceeded, and that therefore section 123 (7) had been contravened, and accordingly declared the election void under section 100 (2) (*b*) of the Act. The appellant disputes the correctness of this order. The Tribunal also recorded as part of the order a finding that the appellant had become subject to the disqualifications specified in section 140, sub-clauses (1) (*a*) and (2). The appellant attacks this finding on the ground that it was given without notice to him, as required by the proviso to section 99.

The points that arise for decision in this appeal are (1) whether on the facts found, there was a contravention of section 123 (7) of Act No. XLIII of 1951; and (2) whether the finding that the appellant had become disqualified under section 140 is bad for want of notice under the proviso to section 99 of the Act.

(1) Taking first the sum of Rs. 500 paid by the appellant to the Tamil Nad Congress Committee on 12th September, 1951, the contention of the appellant is that section 123 (7) and rule 117 have reference only to expenses incurred by a candidate or his agent, that the appellant was nominated as a candidate only on 16th November, 1951, and that as the payment in question was made long prior to the filing of the nomination paper, the provisions aforesaid had no application. That raises the question as to when the appellant became a 'candidate' for purposes of section 123 (7). Section 79 (*b*) of Act No. XLIII of 1951 defines a candidate thus:

> "'Candidate' means a person who has been or claims to have been duly nominated as a candidate at any election, and any such person shall be deemed to have been a candidate as from the time when, with the election in prospect, he began to hold himself out as a prospective candidate".

Under this definition which applies to section 123 (7), all election expenses incurred by a candidate from the time when, with the election in prospect, he holds himself out as a prospective candidate and not merely from the date when he is nominated, will have to enter into the reckoning under rule 117 read with Schedule V. That the election was in prospect when the amount of Rs. 500 was paid is clear from the very application of the appellant dated 12th September, 1951, wherein he states that he desires "to contest as a Congress candidate in the forthcoming election." That is not disputed by the appellant. What he contends is that though the election was in prospect, he had not become a prospective candidate at that time, and that he became so only when the Congress adopted him as its candidate on 13th November, 1951. It was argued that it was open to the Congress Committee either to adopt him as its candidate or not, that if it did not adopt him, he could not, under the rules to which he had subscribed, stand for election at all, that until he was actually adopted therefor, his candidature was nebulous and uncertain, and that the application was consequently nothing more than a preliminary step-in-aid of his becoming a prospective candidate.

The question when a person becomes a candidate must be decided on the language of section 79 (*b*). Under that section, the candidature commences when the person begins to hold himself out as a prospective candidate. The determining factor therefore is the decision of the candidate himself, not the act of other persons or bodies adopting him as their candidate.

In *The Litchfield case*[1], at page 36, Baron Pollock observed:

> "I think the proper mode of judging a question of this kind is to take it from the point of view of the candidate himself. Every man must judge when he will throw himself into the arena.... but it is his own choice when he throws down the glove and commences his candidature."

When, therefore, a question arises under section 79 (*b*) whether a person had become a candidate at a given point of time, what has to be seen is whether at that time he had clearly and unambiguously declared his intention to stand as a candidate so that it could be said of him that he held himself out as a prospective candidate. That he has merely formed an intention to stand for election is not sufficient to make him a prospective candidate, because it is of the essence of the matter that he

1. 5 O'M. & H. 1.

should hold himself out as a prospective candidate. That can only be if he communicates that intention to the outside world by declaration or conduct from which it could be inferred that he intends to stand as a candidate. Has that been established in this case? When the appellant made the payment of Rs. 500 to the Tamil Nad Congress Committee, did he merely evince an intention to stand as a candidate, or did he hold himself out as a prospective candidate? The application contains a clear declaration of his intention to contest the election, and that declaration is backed by the solemn act of payment of Rs. 500. The appellant had thus clearly and unambiguously conveyed to the Committee his intention to stand as a candidate, and he thereby became a prospective candidate within the meaing of section 79 (*b*). The possibility that the Congress might not adopt him as its candidate does not, as already mentioned, affect the position, as the section has regard only to the volition and conduct of the candidates. It is true that if the Congress did not adopt him, the appellant might not be able to stand for election. But such a result is implicit in the very notion of a prospective candidate, and does not militate against his becoming one from the date of his application.

It was also urged for the appellant that the declaration was made not to the the constituency in the North Arcot District but to the Central Committee at Madras, and that unless there was proof of holding out to the electorate, the requirements of section 79 (*b*) were not satisfied. It may be that the holding out which is contemplated by that section is to the Constituency; but if it is the Central Committee that has to decide who shall be adopted for election from the concerned Constituency, any declaration made to the Committee is, in effect, addressed to the Constituency through its accredited representative. The question when a candidature commences is, as has been held over and over again, one of fact and a decision of the Tribunal on that question is not liable to be reviewed by this Court in special appeal. In the present case, the Tribunal has, in a well-considered judgment,formulated the correct principles to be applied in determining when a candidature commences, examined the evidence in the light of those principles, and recorded a finding that the appellant was a prospective candidate when he made the payment of Rs. 500 on 12th September, 1951, and we do not find any ground for differing from it.

Then, there is the payment of Rs. 500 made to the North Arcot District Congress Committee on 23rd September, 1951. The contention of Mr. Chatterjee with reference to this payment is that unlike the payment dated 12th September, 1951, this was not spent for purposes of election but was donation made to the Committee out of philanthropic motives. It has been frequently pointed out that while it is meritorious to make a donation for charitable purposes, if that is made at the time or on the eve of an election, it is open to the charge that its real object was to induce the electors to vote in favour of the particular candidate, and that it should therefore be treated as election expense. In *The Wigan Case*[1], Bowen, J., observed:

> "....I wish to answer the suggestion that this was merely charity. Charity at election times ought to be kept by politicians in the background....In truth, I think, it will generally be found that the feeling which distributes relief to the poor at election time, though those who are the distributors may not be aware of it, is really not charity, but party feeling follewing in steps of charity, wearing the dress of charity, and mimicking her gait".

In *The Kingston Case*[2], Ridley, J., said:

> "Now assume for the moment that a man forms a design, which at the time is in prospect, for that is the point; yet if circumstances alter, and an election becomes imminent, he will go on with that design at his risk".

It would again be a question of fact whether the payment of Rs. 500 by the appellant on 23rd September, 1951, was a pure act of charity or was an expense incurred for election purposes. It was admitted by the Secretary of the North Arcot District Congress Committee that it was usual for the Tamil Nad Congress Committee to consult the local Committee in the matter of adoption of candidates,

1. 4 O'M. & H. 1. 2. 6 O'M. & H. 374.

and that at the time the payment was made, it was known that the appellant had applied to be adopted by the Congress. Exhibit A-7 which is a statement of receipts and payments of the North Arcot District Congress Committee for the period 24th September, 1951 to 24th May, 1952, shows that the Committee started with an opening balance of Rs. 7-12-2, and that various amounts were collected including the sum of Rs. 500 paid by the appellant and utilised for election expenses. The Tribunal held on a consideration of these facts that the payment in question could not be regarded as innocent and "not motivated by the desire to obtain the recommendations of the North Arcot District Congress Committee for candidature of the first respondent." No ground has been shown for differing from this conclusion.

It was finally contended for the appellant that the two payments dated 12th September, 1951 and 23rd September, 1951, could not be said to be expenses incurred on account of the conduct and management of an election, and reliance was placed on the decision in *The Kennington case*[1], where it was held that payments made for the running of a newspaper started for supporting a candidate were not expenses incurred in the conduct and management of an election. The facts of the present case have no resemblance to those found in that case, and the following comment on that decision in Parker's Election Agent and Returning Officer, fifth edition, page 241, is instructive :

" But this decision could not be safely followed except where the facts are precisely similar ".

On the findings recorded above, the expenses incurred by the appellant come to Rs. 8,063, and the corrupt practice specified in section 123 (7) has been committed. The election was therefore rightly set aside under section 100 (2) (*b*) of Act No. XLIII of 1951.

(2) It is next contended for the appellant that the Tribunal was in error in recording as part of the order a finding that by reason of the contravention of section 123 (7), the appellant had become subject to the disqualification specified in section 140, without giving notice to him as required by the proviso to section 99. The question whether a party to an election petition is entitled to a notice under the proviso in respect of the very charges which were the subject-matter of enquiry in the petition itself, has been considered by this Court in *Tirath Singh* v. *Bachittar Singh*,[2] and it has been held therein that if the party had opportunity given to him in the hearing of the petition to meet the very charge in respect of which a finding is to be recorded under section 99 (1) (*a*), then he is not entitled to a further notice in respect of the same matter, under the proviso. In the present case, the finding under section 99 (1) (*a*) relates to the very payments which were the subject-matter of enquiry in the election petition, and therefore no notice was required to be given to the appellant under the proviso. This objection also fails, and the appeal must accordingly be dismissed.

The respondent has stated through his counsel Shri Naunit Lal that he does not propose to contest the appeal. There will accordingly be no order as to costs.

Appeal dismissed.

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1. 4 O'M. & H. 93.

2. Since reported in (1955) S.C.J. 797.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. R. DAS, *Acting Chief Justice*, N. H. BHAGWATI, B. JAGANNADHADAS, SYED JAFER IMAM AND N. CHANDRASEKHARA AIYAR, JJ.

Messrs. Ram Narain Sons, Ltd., and others .. *Appellants**

v.

Asst. Commissioner of Sales Tax & others .. *Respondents.*

Berar Oil Industries & others .. *Interveners.*

Constitution of India (1950), *Article* 286—*Scope of the bans imposed under—President's Order* (*Sales Tax Continuation Order No. VII of* 1950), *issued in exercise of powers conferred by the proviso to Article* 286 (2)—*Scope and effect.*

By the Majority of the Court (*Jagannadhadas, J.*, dissenting) :—The bans imposed by Article 286 of the Constitution on the taxing powers of the States are independent and separate and each one of them has to be got over before a State Legislature can impose tax on transactoins of sale or purchase of goods. These bans have been imposed from different viewpoints, and, even through the transactions of the sale or purchase may in conceivable cases overlap so far as these different viewpoints are concerned, each of those bans is operative and has to be enforced. So far as Article 286 (1) (*a*) is concerned the Explanation determines by the legal fiction created therein the situs of the sale in the case of transactions coming within that category and when a transaction is thus determined to be inside a particular State it necessarily becomes a transaction outside all other States. The only relevant enquiry for the purposes of Article 286 (1) (*a*), therefore, is whether a transaction is outside the State, and once it is determined by the application of the Explanation that it is outside the State it follows as a matter of course that the State with reference to which the transactions can thus be predicated to be outside it can never tax the transaction. This ban is effective independently of the fact that the transaction may also have taken place in the course of inter-State trade or commerce or with reference to goods as have been declared by Parliament by law to be essential for the life of the community. The ban imposed under Article 286 (2) is an independent and separate one and looks at the transactions entirely from the point of view of their having taken place in the course of inter-State trade or commerce. Even if such transactions may also fall within the category of transactions covered by Article 286 (1) (*a*) and the Explanation thereto or Article 286 (3), the moment Article 286 (2) is attracted by reason of the transactions being in the course of inter-State trade or commerce, the ban under Article 286 (2) operates and such transactions can never be subjected to tax at the instance of a State Legislature, except in so far as Parliament by law may otherwise provide or such power of taxation is saved by the President's Order contemplated in the Proviso. The ban under Article 286 (2) may be saved by the President's Order but that does not affect or lift the ban under Article 286 (1) (*a*) read with the Explanation.

Apart from this the terms of the Proviso itself make it abundantly clear that the proviso is meant only to lift the ban under Article 286 (2) and no other. The *non-obstante* clause makes it abundantly and further clear and states in explicit terms that it is enacted only with reference to "*this clause*", *i.e.*, Article 286 (2). The President's Order only lifted the ban in so far as the transactions took place in the course of inter-State trade or commerce and could not be projected into the sphere of any other clause of Article 286. It had therefore not the effect of lifting the ban which was imposed by Article 286 (1) (*a*) and the Explanation thereto, even though the transactions covered by the Explanation to Article 286 (1) (*a*) by and large fell within the category of transactions which took place in the course of inter-State trade or commerce. The ban imposed by Article 286 (1) (*a*) was independent and separate and could not be lifted by the President's Order which had operation only in regard to the inter-State character of the transactions. The moment it was determined that the transactions were outside the State by virtue of the Explanation to Article 286 (1) (*a*) the ban imposed by Article 286 (1) (*a*) attached to the same and could not be lifted by the President's Order which operated only on the inter-State character of the transactions and saved only those inter-State transactions which did not come within the Explanation.

So far as the post-Constitution period is concerned the ban which is imposed by Article 286 (1) (*a*) and the Explanation thereto cannot be removed by the President's order issued under the Proviso to Article 286 (2).

Where such assessment is a composite one for the post-Constitution period as well as the pre-Constitution period, it is invalid *in toto*.

Per *Jagannadhadas, J.*—The pre-Constitution sales-tax laws, if then lawful are not hit by Article 286 (1) (*a*) at least to the extent that the ban under Article 286 (1) (*a*) overlaps with that under Article 286 (2).

Appeals under Article 132 (1) of the Constitution of India from the Judgment and Order dated the 18th October, 1954 of the Nagpur High Court in Misc. Petitions Nos. 265, 348 and 275 of 1953 respectively.

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* Civil Appeals Nos. 132, 133 and 137 of 1955.
Petition No. 567 of 1954. 20th September, 1955.

(Under Article 32 of the Constitution for the enforcement of fundamental rights.)

M. C. Setalvad, Attorney-General of India (*R. M. Hajarnavis* and *G. C. Mathur*, Advocates, with him) for the Appellant in C.A. No. 132 of 1955.

N. C. Chatterjee, Senior Advocate (*R. M. Hajarnavis* and *G. C. Mathur*, Advocates, with him) for Intervener No. 1 in C. A. No. 132 of 1955.

R. M. Hajarnavis and *G. C. Mathur*, Advocates for Intervener No. 2 in C. A. No. 132 of 1955.

R. M. Hajarnavis and *G. C. Mathur*, Advocates for the Appellant in C. A. No. 133 of 1955.

R. M. Hajarnavis and *G. C. Mathur*, Advocates for the Appellant in C.A. No. 137 of 1955.

M. Adhikari, Deputy Advocate-General of Madhya Pradesh and *I. N. Shroff*, Advocate for Respondents in all Appeals.

M. C. Setalvad, Attorney-General of India and *C. K. Daphtary*, Solicitor-General of India (*A. P. Sen*, *J. B. Dadachanji* and *Rajinder Narain*, Advocates, with them) for the Petitioner in Petition No. 567 of 1954.

T. L. Shevde, Advocate-General of Madhya Pradesh (*M. Adhikari*, Deputy Advocate-General of Madhya Pradesh and *I. N. Shroff*, Advocate, with him) for Respondents.

J. B. Dadachanji, *R. M. Hajarnavis* and *Rajinder Narain*, Advocates for the Intervener.

Civil Appeals Nos. 132, 133 *and* 137 *of* 1955.

(Delivering the Majority view of Das, A.C.J., Bhagwati, Imam and Chandrasekhara Ayyar, JJ.)

Bhagwati, J.—These 3 Appeals with certificate under Article 132 (1) of the Constitution involve the interpretation of the proviso to Article 286 (2) and raise a common question as to whether that proviso also saves the transactions of sale or purchase covered by the Explanation to Article 286 (1) (*a*) from the ban imposed therein.

The Appellants in Civil Appeal No. 132 of 1955 are Messrs. Ramnarain Sons, Ltd., a firm registered as a "dealer" under the Central Provinces and Berar Sales Tax Act, 1947, and carrying on business at Amravati and at other places in Madhya Pradesh. After the Cotton Control Order, 1949, came into force on the 12th September, 1949, the Appellants entered into agreements with several mills situated outside Madhya Pradesh by which they undertook to purchase kapas in the various markets in Madhya Pradesh as their agents on their account and on their behalf. The kapas after purchase was to be ginned and pressed into bales and sent to the mills. All the expenses involved in the process were to be borne by the mills which were also to be credited with the sale proceeds of the cotton seeds and the Appellants were only entitled to commission on a percentage basis. The appellants worked as such agents for the period 1st October, 1949, to 30th September, 1950. By his order dated the 30th June, 1953, the Assistant Commissioner of Sales Tax, Amravati, Respondent No. 1, included the transactions valued at Rs. 72,86,454-5-10 with the said mills in the Appellants' turn-over and ordered the Appellants to pay Rs. 1,13,850-13-6 as sales tax on the the said transactions. The Appellants filed an appeal to the Commissioner of Sales Tax, Madhya Pradesh, Respondent No. 2, on the 30th July, 1953. The appeal was, however, entertained by the Deputy Commissioner of Sales Tax, Madhya Pradesh, Respondent No. 3, who ordered the Appellants to pay Rs. 25,000 by the 31st August, 1953. The Appellants thereupon filed a petition under Article 226, being Misc. Petition No. 265 of 1953, in the High Court of Judicature at Nagpur, asking *inter alia* for the quashing of the order of 30th June, 1953, passed by Respondent No. 1 and for consequential reliefs.

The Respondents filed a return denying the contentions of the Appellants and praying for the dismissal of the petition with costs.

The Appellants in Civil Appeal No. 133 of 1955 are the Eastern Cotton Company, a firm registered as a "dealer" under the Central Provinces and Berar Sales Tax Act, 1947, and carrying on business at Amravati and at other places in Madhya Pradesh. They also, during the period 1st October, 1949, to 30th September, 1950, worked as agents of certain mills situated outside Madhya Pradesh, procured kapas for them in Madhya Pradesh and sent it to the mills for consumption outside the State. By his order dated the 9th September, 1953, the Respondent No. 1 included the transactions valued at Rs. 33,47,405-5-6 with the said mills in the Appellant's turn-over and ordered the Appellants to pay Rs. 52,303-4-0 as tax on the said transactions. These Appellants also filed a petition under Article 226 being Misc. Petition No. 348 of 1953, in the High Court of Judicature at Nagpur for quashing the order dated the 9th September, 1953 passed by Respondent No. 1 and for consequential reliefs. The Respondents filed a return denying their contentions.

The Appellants in Civil Appeal No. 137 of 1955 are the firm, Ramdas Khimji Brothers, Bombay, registered as a "dealer" under the Central Provinces and Berar Sales Tax Act, 1947, and carrying on business as cotton dealers in Madhya Pradesh. During the period 1st October, 1950, to 30th September, 1951, the Appellants sold cotton worth Rs. 6,01,949-1-9 to various persons outside Madhya Pradesh. The cotton was delivered to the buyers for consumption outside Madhya Pradesh as a direct result of such sales. By his order dated the 29th December, 1952, the Sales Tax Officer, Amravati, in the assessment of the Appellants for the same period, included the said transactions in the Appellants' turn-over and assessed sales tax thereon. The Appellants filed an appeal to Respondent No. 1 but the same was dismissed by an order dated the 10th July, 1953. The Appellants filed on 22nd August, 1953, a revision before the Commissioner of Sales Tax, Madhya Pradesh. The Appellants also filed a petition under Article 226, being Misc. Petition No. 274 of 1953, in the High Court of Judicature at Nagpur, asking for a writ of *certiorari* quashing the order of Respondent No. 1 passed by him in Sales Tax Appeal No. 13-A dated the 10th July, 1953, and for consequential reliefs. The Respondents filed a return denying the contentions of the Appellants and asking that the petition be dismissed with costs.

These petitions came up for hearing and final disposal before the High Court of Judicature at Nagpur along with Misc. Petitions No. 288 of 1953 and No. 132 of 1954. A considered judgment was delivered in Miscellaneous Petition No. 132 of 1954 and the reasoning contained therein governed the decision in the connected Petitions Nos. 265, 274 and 348 of 1953. The High Court held that the Explanation II to section 2 (*g*) of the Central Provinces and Berar Sales Tax Act, 1947, as amended by the Central Provinces and Berar Act XVI of 1949 having been declared invalid from its inception by the High Court in *Messrs. Shriram Gulabdas* v. *Board of Revenue*[1], and by this Court in *Himmatlal Harilal Mehta* v. *State of Madhya Pradesh*[2] the original Explanation remained in force until the 1st April, 1951, when it was amended by the Madhya Pradesh Act IV of 1951. Explanation II originally enacted was in the terms following :—

> "Notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale of any goods which are actually in the Central Provinces and Berar at the time when the contract of sale as defined in that Act in respect thereof is made, shall, wherever the said contract of sale is made, be deemed for the purpose of this Act to have taken place in the Central Provinces and Berar".

The Appellants contended that this Explanation offended Article 286 (1) (*a*) read with the Explanation to the same and the State of Madhya Pradesh was, therefore, not entitled to tax the transactions of sale in which goods had actually been delivered as a direct result of such sale for the purpose of consumption outside Madhya Pradesh. The Respondents, on the other hand, contended that the said Explanation was protected until the 31st March, 1951, by the Sales Tax Continuation Order

1. I.L.R. (1953) Nag. 332.
2. (1954) S.C.J. 445 : (1954) S.C.R. 1122.

No. 7 of 1950 issued by the President on the 26th January, 1950, under the proviso to Article 286 (2).

The High Court was of the opinion that the original Explanation was validly enacted as the assent of the Governor-General to the enactment was given on the 23rd May, 1947 and that under that Explanation the tax prior to the commencement of the Constitution was lawfully levied on the sales of goods wherever the contracts of sale took place if the goods were actually in the State at the time the contracts of sale were made. This power could be exercised by the State even if the sales took place during the course of inter-State trade or commerce and the goods were delivered as a direct result of the sales for the purpose of consumption outside the State. This was because the situs of the goods constituted a sufficient nexus between the transactions and the taxing State which was the foundation for taxation prior to the commencement of the Constitution. This position continued until the commencement of the Constitution and on the 26th January, 1950, the President issued Sales Tax Continuation Order No. 7 of 1950 in exercise of the powers conferred by the proviso to Article 286 (2). The sales in question had taken place in the course of inter-State trade or commerce and accordingly they were covered by Article 286 (2) and would, therefore, be liable to tax even after the commencement of the Constitution by virtue of the President's order. Reliance was further placed on the majority judgment of this Court in *The State of Bombay* v. *The United Motors (India) Ltd.*[1], where it was held that the transaction *vis-a-vis* the delivery State lost its inter-State character if it fell within the Explanation to Article 286 (1) (*a*) and was accordingly made liable to taxation by the delivery State . So far, however, as the exporting State was concerned, it retained its character of an inter-State transaction and would not, therefore, be liable to taxation by that State, *vide* Article 286 (2). The President's order, however, removed this ban and the exporting State was entitled to tax the transaction by virtue of the power derived by it from the same. On a construction of the relevant provisions of Article 286 (1) and Article 286 (2) the High Court was of the opinion that it would be making the proviso to Article 286 (2) nugatory if it was held that Article 286 (1) overrides it and takes away the taxing power of all States in inter-State trade or commerce except the delivery State. The High Court accordingly dismissed the petitions with costs.

The learned Attorney-General appearing for the Appellants before us contended that so far as the post-Constitution period is concerned, the position is governed by our judgment in *The Bengal Immunity Co., Ltd.* v. *The State of Bihar*[2], delivered on the 6th September, 1955. He urged that the bans imposed on the powers of the State Legislatures to levy taxes on the sale or purchase of goods in the several clauses of Article 286 are independent and separate and that the transactions of sale or purchase referred to in the various clauses must be looked at from different view-points. Even if a transaction might fall within the category of inter-State sale or purchase and the President's order under the proviso to Article 286 (2) might enable the State to levy any tax on such sale or purchase which was being lawfully levied by the State immediately before the commencement of the Constitution, such transaction had also to surmount the ban imposed under Article 286 (1) (*a*) and the Explanation thereto so that, if, as a direct result of such sale, the goods were actually delivered for the purpose of consumption in another State, the exporting State (to use the phraseology of the Nagpur High Court) or the title-State (to use the phraseology adopted in some of the judgments in The Bengal Immunity Co.'s Appeal) would not be entitled to levy a tax on such sale the transaction being fictionally outside the State by reason of the Explanation and therefore coming within the ban of Article 286 (1) (*a*).

It was, however, urged on behalf of the State of Madhya Pradesh that the President's order not only saved the transactions from the ban of Article 286 (2) but also from the ban of Article 286 (1) (*a*), because the transactions covered by the Expla-

1. (1953) S.C.J. 373 : (1953) 1 M.L.J. 743 : (1953) S.C.R. 1069 (S.C.).

2. Since reported in (1955) 2 M.L.J. 168 : (1955) S.C.J. 672 : (1955) Andh.W.R. 422(S.C.)

nation to Article 286 (1) (*a*) were of the same category as transactions covered by Article 286 (2) and were all in the course of inter-State trade or commerce. It was further urged that if the transactions covered by the Explanation to Article 286 (1) (*a*) were not saved from the ban by the President's order, the whole intention of the Constitution-makers in maintaining the *status-quo* qua the taxes on sales or purchases of goods which were being lawfully levied by the State immediately before the commencement of the Constitution would be frustrated, because the transactions covered by the Explanation to Article 286 (1) (*a*) being necessarily in the course of inter-State trade or commerce the President's order would be rendered nugatory and the exporting State or the title State would be restrained from levying tax on such transactions in spite of the ban having been lifted by the President's order.

We are unable to accept this contention. As held by the majority Judges in The Bengal Immunity Co's Appeal,[1] the bans imposed by Article 286 on the taxing powers of the States are independent and separate and each one of them has to be got over before a State Legislature can impose tax on transactions of sale or purchase of goods. These bans have been imposed from different view-points, and, even though the transactions of sale or purchase may in conceivable cases overlap so far as these different view-points are concerned, each of those bans is operative and has to be enforced. So far as Article 286 (1) (*a*) is concerned, the Explanation determines by the legal fiction created therein the situs of the sale in the case of transactions coming within that category and when a transaction is thus determined to be inside a particular State it necessarily becomes a transaction outside all other States. The only relevant enquiry for the purposes of Article 286 (1) (*a*), therefore, is whether a transaction is outside the State and once it is determined by the application of the Explanation that it is outside the State it follows as a matter of course that the State with reference to which the transaction can thus be predicated to be outside it can never tax the transaction. This ban is effective independently of the fact that the transaction may also have taken place in the course of inter-State trade or commerce or with reference to goods as have been declared by Parliament by law to be essential for the life of the community. The ban imposed under Article 286 (2) is an independent and separate one and looks at the transactions entirely from the point of view of their having taken place in the course of inter-State trade or commerce. Even if such transactions may also fall within the category of transactions covered by Article 286 (1) (*a*) and the Explanation thereto or Article 286 (3), the moment Article 286 (2) is attracted by reason of the transactions being in the course of inter-State trade or commerce, the ban under Article 286 (2) operates and such transactions can never be subjected to tax at the instance of a State Legislature except in so for as Paliament by law may otherwise provide or such power of taxation is saved by the President's order contemplated in the proviso. The ban under Article 286 (2) may be saved by the President's order but that does not affect or lift the ban under Article 286 (1) (*a*) read with the Explanation.

Apart from the construction thus put upon the several Clauses of Article 286 by the majority of the Judges in The Bengal Immunity Co.'s Appeal as above, the terms of the proviso itself make it abundantly clear that the proviso is meant only to lift the ban under Article 286 (2) and no other. It is a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other. Even if the *non obstante* clause : "Notwithstanding that the imposition of such tax is contrary to the provisions of this Clause": had not been enacted in the proviso, the proviso could only have been construed as operating upon the field enacted in Article 286 (2) and could not be extended to any of the other provisions of Article 286. The *non obstante* clause, however, makes it abundantly and further clear and states in explicit terms that it is enacted only with reference to "*this clause*" *i.e.*, Article 286 (2). The President's order may direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately

before the commencement of the Constitution was to continue to be levied until 31st March, 1951, but the effect of that order was to raise the ban in so far as it was imposed by the provisions of "this clause." The President's order, therefore, only lifted the ban in so far as the transactions took place in the course of inter-State trade or commerce and could not be projected into the sphere of any other clause of Article 286. It had, therefore, not the effect of lifting the ban which was imposed by Article 286 (1) (*a*) and the Explanation thereto, even though the transactions covered by the Explanation to Article 286 (1) (*a*) by and large fell within the category of transactions which took place in the course of inter-State trade or commerce. The ban imposed by Article 286 (1) (*a*) was independent and separate and could not be lifted by the President's order which had operation only in regard to the inter-State character of the transactions. The moment it was determined that the transactions were outside the State by virtue of the Explanation to Article 286 (1) (*a*) the ban imposed by Article 286 (1) (*a*) attached to the same and could not be lifted by the President's order which operated only on the inter-State character of the transactions and saved only those inter-State transactions which did not come within the Explanation.

If the contention urged on behalf of the State of Madhya Pradesh is accepted, it would mean that we should re-write or amend the proviso to Article 286 (2) in order to effectuate the supposed intention of the Constitution-makers. The supposed intention of the Constitution-makers was alleged to be to preserve to the States all the taxes on sale or purchase of goods which were being lawfully levied by them immediately before the commencement of the Constitution by having resort to the territorial connection or nexus theory. We have no evidence before us of this supposed intention of the Constitution-makers. Whatever their intention was can only be gathered from the language which they have used and where the language is plain there is no scope whatever for speculation in that behalf. When the Constitution-makers themselves used the words "notwithstanding that the imposition of such a tax is contrary to the provisions of *this clause*" it would not be legitimate for us to go behind the plain words and try to read into the proviso something which would involve either a deletion of the *non obstante* clause or a re-writing thereof as suggested. Whatever be the effect of our judgment on the treasuries of the exporting or title-States we cannot assist them by reading something into the proviso which is not warranted by any canon of construction. The proviso has reference only to Article 286 (2) and cannot be projected into any other clause of Article 286.

The untenability of the contentions of the Respondents will be clear from the following illustration :—

Suppose the goods are in the State of Madhya Pradesh at the time the contracts of sale of those goods are made in, say, the State of Bombay. Suppose further that the property in the goods has by reason of such sales passed in the State of Bombay but the goods as a direct result of such sales have been delivered for consumption in the State of Madras. According to the Respondents, the President's order made under the proviso to Article 286 (2) saves the transactions from the ban of Article 286 (1) (*a*) read with the Explanation. Then the State of Madras will be able to tax by virtue of Article 286 (1) (*a*) read with the Explanation or on the nexus theory by reason of the goods being delivered there for consumption ; the State of Bombay will be able to tax because the title to the goods passed there ; and the State of Madhya Pradesh will also be able to tax under the Explanation II to section 2 (*g*) of the Act because the goods were in the State of Madhya Pradesh at the time when the contracts of sale were made in the State of Bombay. Nobody will say that the Constitution-makers intended to perpetuate multiple taxation of this kind and yet that will be the result if we were to accede to the arguments advanced by the Respondents.

The result, therefore, is that so far as the post-Constitution period is concerned the ban which is imposed by Article 286 (1) (*a*) and the Explanation thereto cannot be removed by the President's order which was issued under the proviso to Article

286 (2) and the High Court was in error when it construed the proviso to Article 286 (2) as projecting into the field of Article 286 (1) (*a*) and lifting the ban imposed therein.

On the above reasoning, Civil Appeal No. 137 of 1955 filed by the firm of Ramdas Khimji Brothers, Bombay, which relates only to the post-Constitution period will be allowed and the order of assessment dated the 29th December, 1952, will be set aside. The Respondents will pay the costs of the Appellants here as well as in the Court below.

As regards Civil Appeals Nos. 132 of 1955 and 133 of 1955, however, the assessments therein relate not only to the post-Constitution period but also the pre-Constitution period to which different considerations would apply. The validity of the assessment in regard to the same would have to be canvassed having regard to the various contentions of law and fact which could be urged against the same by the Appellants. There are two outstanding questions which have been mooted before us by the learned Attorney-General in regard to this period, *viz.*, (1) a question of fact, as to whether the Appellants were agents of the various mills in regard to the transactions which were the subject-matter of the assessment, and (2) a question of law, whether the law under which the tax was levied, *viz.*, Explanation II to section 2 (*g*) of the Act was validly enacted. Both these contentions, though they are also relevant to the post-Constitution period were not specifically pressed before us because the argument based on the proviso to Article 286 (2) was considered sufficient to set aside the assessment for that period. They would, however, appropriately arise and be urged by the appellants when the liability to assessment for the pre-Constitution period is to be determined and if we were to determine that liability we would have to deal with the same. The necessity for doing so is, however, obviated by reason of the fact that the assessment is one composite whole relating to the pre-Constitution as well as the post-Constitution periods and is invalid in toto. There is authority for the proposition that when an assessment consists of a single undivided sum in respect of the totality of the property treated as assessable, the wrongful inclusion in it of certain items of property which by virtue of a provision of law were expressly exempted from taxation renders the assessment invalid in toto. The Privy Council have observed in *Bennett & White (Calgary) Ld., And Municipal District of Sugar City No. 5.*[1]

"When an assessment is not for an entire sum but for separate sums dissected and earmarked each of them to a separate assessable item a Court can sever the items and cut out one or more along with the sum attributed to it while affirming the residue. But where the assessment consists of a single undivided sum in respect of the totality of property treated as assessable and when one component (not dismissible as "de minimis") is on any view not assessable and wrongly included it would seem clear that such a procedure is barred and the assessment is bad wholly. That matter is covered by authority. In *Montreal Light, Heat & Power Consolidated* v. *City of Westmount*[2] the Court (*see* especially per Anglin, C.J.) in these conditions held that an assessment which was bad in part was infected throughout and treated it as invalid. Here their Lordships are of opinion by party of reasoning, that the assessment was invalid in toto".

It was, therefore, urged that on the facts of this case the assessment was invalid in toto and that it should be set aside. The learned Deputy Advocate-General of Madhya Pradesh did not seriously contest this position and the result, therefore, is that the order of assessment dated the 30th June, 1953, in Civil Appeal No. 132 of 1955 and the order of assessment dated the 9th September, 1953, in Civil Appeal No. 133 of 1955 are liable to be set aside. The appeals will therefore be allowed, the orders of assessment will be set aside and the matters will go back to the Assessment Officer for re-assessment of the Appellants in accordance with law. The Appellants will be at liberty to urge before the Assessment Officer the contentions of law and fact available to them in the fresh assessment proceedings including those adverted to above. The Respondents will pay the costs of these Appellants here as well as in Court below.

1. (1951) A.C. 786 at p. 816. 2. (1926) S.C.R. (Can.) 515.

Petition No. 567 *of* 1954.

Bhagwati, J.—This petition under Article 32 of the Constitution also involves the interpretation of the proviso to Article 286 (2) and raises the same question as to the meaning, scope and operation of the proviso as was raised in the Civil Appeals Nos. 132, 133 and 137 of 1955 just disposed of.

The facts giving rise to this Petition may be shortly stated. The petitioners are a partnership firm carrying on business of manufacturing bidis at Jabalpur and registered as a "dealer" under the Central Provinces and Berar Sales Tax Act, 1947. The petitioners had their branches at Lucknow, Kanpur, Faizabad, Agra, Bombay and Bhopal. They had also their selling agents at various places in Uttar Pradesh and elsewhere outside the State of Madhya Pradesh. They also entered into transactions direct with merchants in Uttar Pradesh. The transactions in question which were the subject-matter of assessment at the instance of the Sales Tax authorities were for the period of assessment 21st October, 1949 to 9th November, 1950, and spread over two periods, *viz.*, (1) the period between 21st October, 1949, to 25th January, 1950, which may be called the pre-Constitution period, and (2) the period subsequent to the inauguration of the Constitution on the 26th January, 1950, up to the 9th November, 1950, which may be called the post-Constitution period. The petitioners' gross turn-over was determined to be Rs. 49,40,140-6-9 and the amount of sales tax assessed on the transactions was Rs. 1,51,291-13-0 as per the order of the Deputy Commissioner, Sales Tax, Madhya Pradesh, Respondent No. 3, dated the 14th July, 1954, in Sales Tax Appeal No. 6/A-1-6-54. The petitioners preferred a second appeal to the Respondent No. 2 against the said order. The Respondent No. 2, however, refused to admit or register the appeal unless the amount of tax assessed was paid up. The petitioners paid about Rs. 91,000 towards the amount of tax assessed but finding it difficult to pay the balance filed this Petition against the State of Madhya Pradesh, Respondent No. 1, the Commissioner of Sales Tax, Madhya Pradesh, Respondent No. 2, and the Deputy Commissioner of Sales Tax, Madhya Pradesh, Respondent No. 3, for a writ of *certiorari* quashing the said order dated the 14th July, 1954, made by Respondent No. 3 and for consequential reliefs. The Respondents filed a return denying the contentions of the petitioners and maintaining that the sales tax was lawfully assessed by them against the petitioners.

The position as regards the petitioners' turn-over for the period of assessment was as stated below :

Nature of the parties.	*Sales Prices of Goods.* Rs.		
(*a*) Direct to selling agents on orders	6,15,236	3	0
(*b*) Direct to Merchants on orders ..	3,99,450	2	0
(*c*) Direct to destinations other than branches or depots but accounted for against branches and depots ..	6,20,996	14	0
(*d*) Direct to Stations or destinations having branches or depots owned by the proprietors of this registered firm—Kanpur, Bombay, Lucknow and Faizabad	31,06,739	13	0

The Sales Tax authorities treated all these transactions as transactions of sale coming within the definition contained in Explanation II to section 2 (*g*) of the Act and assessed the petitioners to sales tax in respect of the same, negativing the contentions of the petitioners that they were in any event sales effected by them outside the State of Madhya Pradesh and that the State of Madhya Pradesh was, therefore, not entitled to impose a tax on those transactions by virtue of the provisions of Article 286 (1) (*a*) and the Explanation thereto.

The learned Attorney-General who appeared for the petitioners contended that the bidis manufactured by the petitioners were all actually delivered as a direct result of the transactions of sale for the purpose of consumption in the State of Uttar Pradesh and that after the inauguration of the Constitution on the 26th January, 1950, it was only the State of Uttar Pradesh which was the delivery State

that alone had the right to impose the tax on these transactions notwithstanding the fact that under the general law relating to the sale of goods the property in the goods might have passed in the State of Madhya Pradesh. He, therefore, urged that these transactions were sales outside the State of Madhya Pradesh and that the State of Madhya Pradesh was not entitled to impose a tax on such sales.

The learned Advocate-General of Madhya Pradesh on the other hand contended that these were purely intra-State transactions entered into by the petitioners within the State of Madhya Pradesh and that the Explanation to Article 286 (1) (*a*) did not come into play at all because the goods were not actually delivered as a direct result of such sales for the purpose of consumption in the State of Uttar Pradesh. He, therefore, maintained that even for the post-Constitution period there was no ban on the State of Madhya Pradesh imposing the sales tax on what were purely "inside sales."

It is necessary in view of these rival contentions to ascertain the true nature of the transactions in question. In paragraph 15 of the Petition, the petitioners had averred that the bidis manufactured by the firm were all delivered in the State of Uttar Pradesh for consumption in that State and that after the 26th January, 1950, the delivery State, *viz.*, the State of Uttar Pradesh, had alone the right to impose tax on the sales of the commodity. They had further submitted that the State of Madhya Pradesh where the bidis were manufactured and from where they were sent could not any more exercise its right to levy a tax on such transactions of sale taking place elsewhere by reason of the inhibition contained in Article 286. In the return filed by the Respondents, they did not deny the allegation made by the petitioners in their Petition that the bidis manufactured by the firm were all delivered in the State of Uttar Pradesh for consumption in that State. In substance, they contended that in spite of the State of Uttar Pradesh being the delivery State within the meaning of the Explanation to Article 286 (1) (*a*), the liability of these transactions to sales tax at the instance of the State of Madhya Pradesh was saved by the Presidnet's order made under the proviso to Article 286 (2) and that the imposition of such tax at the instance of the State of Madhya Pradesh was lawful and did not contravene the provisions of Article 286 (1) (*a*) read with the Explanation thereto.

Both the order which was made by the Assistant Commissioner of Sales Tax, Jabalpur, in the original assessment case No. 16 of 1950-51, dated the 7th August, 1953, and the order which was made in Sales Tax Appeal No. 6-A-1-6-54 by the Deputy Commissioner of Sales Tax, Madhya Pradesh, Respondent No. 3, dated the 14th July, 1954, proceeded on the basis that even though the transactions in question were transactions of sale where the goods had actually been delivered as a direct result of such sales for the purpose of consumption in the State of Uttar Pradesh, the President's order made under the proviso to Article 286 (2) saved the transactions also from the ban of Article 286 (1) (*a*) and the Explanation thereto and that the State of Madhya Pradesh was, therefore, entitled to impose a tax on the same. It was never contended before either of them that the sales were purely "inside sales" and that the Explanation to Article 286 (1) (*a*) did not come into play at all under the circumstances of the case. The facts as found by the Sales Tax authorities also emphasized that these transactions fell within the definition of sale contained in the Explanation II to section 2 (*g*) of the Act and that so far as the post-Constitution period was concerned they were saved from the ban of Article 286 (1) (*a*) and the Explanation thereto by the President's order made under the proviso to Article 286 (2). It was, however, urged by the learned Advocate-General of Madhya Pradesh that the transactions were pure "inside sales" entered into by the petitioners in Madhya Pradesh on orders received by them from outside the State. These orders were accepted by the petitioners in the State of Madhya Pradesh and goods were appropriated to the contracts and the property in the goods passed within the State of Madhya Pradesh and that, therefore, they were pure intra-State sales or "inside sales" which it was within the competence of the State of Madhya Pradesh to tax.

This contention of the learned Advocate-General of Madhya Pradesh is untenable. So far as direct supplies to selling agents on orders and direct supplies to merchants on orders covered by items (*a*) and (*b*) above are concerned, it was found that these supplies were made to the merchants buying the goods on commission basis or profit on their previous orders, instructions or indents which were either in printed forms or in ordinary letters and the sale prices were realised by sending bills and railway receipts through some sheduled banks. The very fact that the bills and the railway receipts were sent through the scheduled banks went to show that the petitioners reserved the right of disposal of goods covered by those railway receipts and the property in the goods passed in the State of Uttar Pradesh only after the relative bills were either accepted or honoured by the purchasers and the railway receipts delivered by the scheduled banks to them. It is clear, therefore, that in those cases the sales were completed in the State of Uttar Pradesh and were not intra-State sales or "inside sales" *qua* the State of Madhya Pradesh. As regards the direct supplies to destinations other than branches or depots but accounted for against the branches or depots being item (*c*) above, it was found that the petitioners despatched the goods and billed them to depot managers who were responsible for the collection of the orders and then the railway receipts and bills were sent there. The managers prepared other bills adding incidental or other charges and delivered the railway receipts to the customers to whom the goods were sent from the State of Madhya Pradesh. Here also the despatches of the goods were made from the State of Madhya Pradesh by the petitioners to their depot managers and it was the depot managers who in their turn prepared and submitted their own bills and handed over the railway receipts to the respective customers appropriating the goods themselves to the contracts of sale which had been entered into by them with the latter and completing the sales in the State of Uttar Pradesh. These transactions also were, therefore, sales effected in the State of Uttar Pradesh and did not fall within the category of intra-State sales or "inside sales" *qua* the State of Madhya Pradesh.

The direct supplies to Stations or destinations having branches or depots owned by the proprietors of the firm, Kanpur, Bombay, Lucknow and Faizabad being item (*d*) above, also were outside sales *qua* the State of Madhya Pradesh inasmuch as the branch managers asked the petitioners to send stocks of goods to execute the orders which they had obtained from the customers to make their own supplies to them. As a matter of fact it was found that several consolidated indents were placed by the depot managers with the petitioners in respect of the previous orders which had been collected by them and the petitioners supplied the goods to the depots or branches in pursuance of such indents. If this was the true position *qua* these supplies, these sales also were completed in the State of Uttar Pradesh by the depots or branches supplying the goods in their turn to several customers. There could be no sales as such between the petitioners on the one hand and their depots or branches on the other hand and the State of Madhya Pradesh could certainly not be at all in a position to tax the same.

The whole theory, therefore, of "inside sales" falls to the ground and the only thing which we are left with is that these transactions were inter-State transactions in which as a direct result of such sales the goods were actually delivered for the purpose of consumption in the State of Uttar Pradesh. The Explanation to Article 286 (1) (*a*) determined the State of Uttar Pradesh to be the State in which the sales took place and which alone was entitled to tax these transactions, the State of Madhya Pradesh becoming an "outside" State for the purpose.

Apart from the ban imposed on the State of Madhya Pradesh under Article 286 (1) (*a*) and the Explanation thereto, these transactions were also in the course of inter-State trade or commerce and were hit by the ban of Article 286 (2). The President's order no doubt lifted that ban but was not competent to lift the ban under Article 286 (1) (*a*) and the Explanation thereto with the result that in spite of that order the State of Madhya Pradesh was not in a position to impose a tax on these transactions during the post-Constitution period.

The assessment of these transactions to tax for the post-Constitution period, therefore, is invalid and cannot be sustained. The assessment, moreover, is a composite one covering the pre-Constitution period as well. The case, therefore, falls within our judgment in Civil Appeals Nos. 132, 133 and 137 of 1955 just delivered, and following the reasoning contained therein, we are of the opinion that the order dated the 14th July, 1954, made by the Deputy Commissioner, Sales Tax, Madhya Pradesh, Respondent No. 3, in Sales Tax Appeal No. 6-A-1—6—1954 should be set aside.

We accordingly allow the Petition, set aside the said order dated the 14th July, 1954, and the matter will go back to the Assessment Officer for re-assessment of the petitioners in accordance with law. The petitioners will be at liberty to urge before the Assessment Officer the contentions of law and fact available to them in the fresh assessment proceedings. The Respondents will pay the costs of the petition.

Jagannadhadas, J.—I regret I feel constrained to differ from the view taken by my learned brothers as regards the construction of proviso to Article 286 (2) and the effect of the Presidential order issued thereunder.

There is no dispute that the proviso has to be construed as part of Article 286 (2). It is meant to empower the President to keep the ban arising thereunder in temporary abeyance so that the States may continue to levy taxes on sales by virtue of their pre-Constitution sales-tax laws (if then lawful) for a limited period. It is urged, however, that the proviso (meaning thereby also the Presidential order thereunder) is effective to lift only the ban under Article 286 (2) and that the ban under Article 286 (1) (*a*) is operative nonetheless. Now, it may be correct to say that these two bans are imposed from different angles and are in that sense independent. But there can be no doubt that they are substantially overlapping in operation. A transaction which brings about an outside sale is also an inter-State transaction (barring, if at all, a few ingeniously conceived and illustrated cases). The effect of each of the bans under Article 286 is to demarcate the fields within which the taxing power of the States on sales cannot operate. If, as I conceive, the two bans under Articles 286 (1) (*a*) and 286 (2), are overlapping, the fact that they are imposed from different angles cannot obscure the result, *viz.*, that they bring about the demarcation of the same—or substantially the same—field of *no* taxation. It appears to me that it is in this light that the proviso and the Presidential order issued thereunder have to be construed. Now, the proviso (with the Presidential order) declares the field covered by sales in the course of inter-State trade and commerce as taxable for a limited period by stating positively and emphatically that " any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State, immediately before the commencement of the Constitution shall continue to be levied until the 31st day of March, 1951." There is no doubt the *non-obstante* clause which will be dealt with presently, and which only emphasises the fact that this is a proviso to Article 286 (2). But there is no mistaking the positive and mandatory terms of the proviso. The effect of this is clearly and unequivocally to make the whole field of inter-State trade and commerce temporarily taxable in respect of the sales which take place in the course thereof. If this be so, it appears to me to be implicit therein that no other ban on such taxation can operate, for the time being, within that very field. To construe the two bans as independently and cumulatively operative is to impute them some kind of picturesque potency and is to miss the reality, *viz.*, that all the bans under Article 286 are meant to serve the same purpose, *viz.*, that of imposing restrictions and thereby demarcating the fields of no taxation. The bans and the proviso are parts of the same Article and have to be harmoniously construed. The unequivocal and positive language of one part, cannot be taken to have been obliterated by the negative language of the other part so as to result in futility.

A similar situation as that contemplated by the proviso would also arise with reference to the saving clause in Article 286 (2). If the proviso is to be construed in the way suggested by the learned Attorney-General, it would seem to follow

that when and as the Parliament lifts the ban under Article 286 (2), the lifting of that ban would equally become futile by virtue of Article 286 (1) (*a*). The Parliament has not in terms been given the power to lift the latter ban. This, therefore, will lead to the extraordinary result that though the Constitution has in terms provided that the ban on taxation of sales in the course of inter-State trade and commerce can be lifted, by the Parliament generally, and by the President for a limited period, the exercise of both these powers would become ineffective and still-born by virtue of Article 286 (1) (*a*). It appears to me unreasonable to impute any such intention as inevitably arising from the language used. It appears to me, with great respect, that, whether it is by parliamentary legislation or by the Presidential action that the ban on taxing sales in the course of inter-State trade and commerce is lifted, the principle of harmonious construction of Article 286 taken as an integral whole, requires that the lifting of the ban is to be construed as laying open for taxation the entire field covered by Article 286 (2) and to carry with it the implication that no other *overlapping* ban will be operative. No doubt, it has been suggested that so far as lifting of the ban under Article 286 (2) by the Parliament is concerned, the same would be at least partly operative by virtue of Article 286 (1) (*a*) taken with the Explanation under which the consumption-delivery State may well be free to tax. This was the view expressed by the learned dissenting Judge in the case in *The State of Bombay* v. *The United Motors (India) Ltd*[1]. But the majority in the recent decision in the *Bengal Immunity Co. Ltd.* v. *State of Bihar*[2] including the said learned Judge, have left that question open. It is problematical whether having regard to the inevitable extra-territorial operation of the levy of such a tax and the consequent harassment to the business community which looms large, the Explanation will receive that construction again and not receive the strict construction preferred in the dissenting judgment in the case in *State of Travancore-Cochin* v. *Shanmugha Vilas Cashew Nut Factory*[3]. The result, therefore, of construing the proviso and by parity of reasoning the saving clause, as merely removing the ban of a particular nature leaving another overlapping ban to operate, would be to render both the saving clause in, and the proviso to, Article 286 (2) virtually nugatory.

The argument based on the *non-obstante* clause in the proviso, *viz.*, " Notwithstanding that the imposition of such tax is contrary to the provisions of this clause ;" remains to be considered. It is urged that this clause clearly indicates the intention that the operation of the proviso is to be confined to the sole purpose of lifting the ban arising under Article 286 (2). With respect, I am unable to agree. The *non-obstante* clause undoubtedly affirms the fact that the proviso is operative in respect of Article 286 (2). But it does not purport to limit the effect of the proviso, which a reasonable construction thereof may justify. A *non-obstante* clause does not normally add to or subtract from the main provision of which it is a part. It is often enough inserted by way of extra caution. But it does not have the effect of limiting the operation of the main provision. (See *Aswini Kumar Ghosh* v. *Arabinda Bose*[4]) and *The Dominion of India* v. *Shrinbai A. Irani*[5]). The suggestion that the Presidential action lifts the ban *only* as regards the inter-State sales would be to read the phrase " notwithstanding that " as meaning " in so far as." I can see no warrant for any such reading.

In my view, therefore, the pre-Constitution sales-tax laws, if then lawful, are not hit by Article 286 (1) (*a*)—at least to the extent that the ban under Article 286 (1) (*a*) overlaps with that under Article 286 (2). In this view, the orders of assessment in these cases cannot be set aside and the validity of the relevant pre-Constitution laws will have to be considered and the further facts gone into.

But it is now not necessary to do so in these cases in the view taken by my learned brothers and the order proposed by them will govern these cases.

Appeals and petition allowed.

[END OF (1955) 2 M.L.J. (S.C.)].

1. 1953 S.C.R. 1069 : 1953 S.C.J. 373 : (1953) 1 M.L.J. 743 (S.C.).
2. 1955 S.C.J. 672: (1955) 2 M.L.J. (S.C.) 168 : 1955 An.W.R. (S.C.) 422 (S.C.).
3. 1954 S.C.R. 53 : 1953 S.C.J. 471.
4. 1953 S.C.R. 1 at 21 and 24 : 1952 S.C.J. 568.
5. (1955) 1 S.C.R. 206 at 213 : 1954 S.C.J. 813.